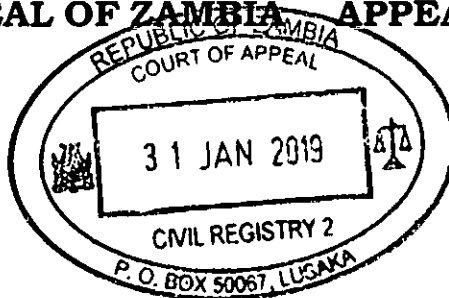


IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 20/2018**
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



JULDAN MOTORS LIMITED

1ST APPELLANT

JULY DANOBO

2ND APPELLANT

AND

NASSER IBRAHIM

1ST RESPONDENT

OLYPA SIBONGILE DANOBO

2ND RESPONDENT

CORAM: Mulongoti, Sichinga and Ngulube, JJA

**On 27th June, 2018, 22nd August, 2018 and 31st
January, 2019**

For the Appellants:

*Mr. H.H. Ndhlovu of H.H Ndhlovu & Co.,
Mr. J. Zimba and N. Botha of Makebi
Zulu Advocates*

For the Respondent:

*Ms. M. Mwiinga of Keith Mweemba
Advocates*

J U D G M E N T

MULONGOTI, JA, delivered the Judgment of the Court

Cases referred to:

1. Minister of Home Affairs, The Attorney General v Lee Habasonda (suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes) SCZ Judgment No. 23 of 2007
2. Finance Bank v Muzeya and four others (CAZ) Appeal No. 115/2017
3. Nkongolo Farms Limited v Zambia National Commercial Bank Limited and others (2007) ZR 78 (SC)
4. Base Chemicals Zambia Limited Mazzanites Limited v. Zambia Air Force, The Attorney General SCZ Judgment No. 9 of 2011
5. Selly Yoat Asset Management v Remote Site Solutions Zambia Limited (2010) Vol 2 ZR 35
6. Finance Bank Zambia Limited v SOCOTEC International Inspection Zambia Limited and another 2010 Vol 2 ZR (HC)
7. Malawo (Male) v Bulk Carriers of Zambia Limited (1978) ZR 185 (SC)
8. Sablehand Zambia Limited v Zambia Revenue Authority (2005) ZR 109 (SC)
9. Rosemary Phiri Madaza v Awadh Keren Collen (2008) 1 ZR 12 (SC)
10. Mwanawasa and others v Mazoka and others (2005) ZR 138 (SC)

Legislation referred to:

1. The Companies Act Chapter 388 of the Laws of Zambia

This is an appeal against the High Court Judgment which held *inter alia* that the respondents are bonafide shareholders of the 1st appellant.

For convenience we will refer to the appellants as the plaintiffs and the respondents as the defendants as they were in the court below. The brief background leading to the appeal is that the 2nd plaintiff, July Danobo, (who testified as PW1) founded a transport service company as far back as 1991 which he operated under a business

name as, Juldan Motors. He later incorporated it into a limited company called Juldan Motors Limited, (the 1st Plaintiff). The company carried on the same business and it had a share capital of 20,000,000. July Danobo was the major shareholder with 1,960,000 shares while his step son Nasser Ibrahim the 1st defendant and his biological son Raymond Danobo (PW2) were the minority shareholders with 20,000 shares each. The three were also directors with July Danobo also being the managing director. Following a family dispute in 2008, July Danobo kicked out his biological son Raymond Danobo and Raymond's shares were transferred to his step sister, Olypa Sibongile Danobo, (the 2nd defendant). The share capital was also increased to 50,000,000 and July's step son Nasser Ibrahim was made a majority shareholder.

According to Nasser Ibrahim, (who testified as DW1) his step father July Danobo did not want to remain a majority shareholder in the company because he was Zimbabwean. After sometime, July Danobo changed his mind and alleged that the shares were transferred to his step children, Nasser Ibrahim and Olypa Sibongile Danobo fraudulently and without his knowledge or

consent. He admitted, that he signed the share transfer documents but insisted that he signed blank documents.

PW1 also testified that when he realised that the shareholding had changed with Nasser Ibrahim now being the majority shareholder, he reported to the police. He also approached the company accountant Mr. Kazhila who told him that he was not the one responsible but it was his ex-wife, Zubeda Mulla, the mother to Nasser and Sibongile. Mr. Kazhila's son PW4 appeared before the Judge in the court below. He said his father was unwell and could not come to court. PW5 Kozhi Kataka investigated the complaint over the shareholding. He interviewed PW1 and showed him the copy of the share certificates from PACRA showing that he (PW1) on 20th May, 2009 had transferred shares to his children, Nasser Ibrahim and Olypa Sibongile Danobo as follows, 24,500,000 to Nasser Ibrahim and 12,000,000 to Olypa Sibongile Danobo. Furthermore, that his biological son, Raymond, had transferred 500,000 to Olypa Sibongile Danobo. July Danobo acknowledged that the signature was his but that he could not remember the contents of the documents at PACRA.

According to PW5, Mr. Kazhila reported to his office in the company of his son PW4. Under warn and caution, he confessed that the transfer of shares was done without the consent of July Danobo. He did the transfer on instructions from Nasser Ibrahim and his mother, Zubeda. PW5 also recorded statements from Zubeda, Olypa Sibongile Danobo and Nasser Ibrahim. They all denied allegations of embezzling funds and forging the share transfer certificates.

Liywahi Mukelebai an Inspector of companies from PACRA (PW6 but also appearing as PW5 page 840 of the Record of Appeal), confirmed the change of shareholding of the company in 2008/2009. He said the share transfer document was prepared on 7th March, 2008 but submitted on 24th June, 2009. He also said the document was submitted to PACRA on 10th March 2008. However, Olypa Sibongile Danobo became a shareholder in the company by Board resolution dated 20th May, 2009. It was his testimony that PACRA Form 28 was not lodged and so the transfer of shares was null and void.

After analysing the evidence, the trial Judge made a number of findings. She found that the company was formed on the basis of a personal relationship and mutual confidence between July Danobo and his sons Raymond Danobo and Nasser Ibrahim. Management was therefore informal but July Danobo was calling the shots.

It was the Judge's view that the relationship soured amongst the shareholders and directors so the action was commenced by July Danobo to assert the company's rights.

The Judge found no evidence to show that any of the shareholders and directors paid for the shares and that they may have probably been given *gratis* at the company's expense. Furthermore, that the increase of the share capital was valid as it was done with the approval of directors.

She also noted that no evidence was led to show that the company or its officers were found to be in default for not filing Form 28. She reasoned that the fact that Form 28 was not found at PACRA did not mean that it was not filed.

The Judge opined that July and Raymond Danobo should blame themselves for blindly signing blank documents. And, that if anything, any blame should be on their company secretary Mr. Kazhila as the defendants had nothing to do with the transfer. She reasoned that the fact that the share transfer documents were undesirably filed does not establish that there was fraud or wrong doing by the defendants. She found that Raymond Danobo ceased to be a member when he transferred his shares to Olypa Sibongile Danobo and that he was therefore not fraudulently removed as a shareholder.

The trial Judge held further that Nasser Ibrahim also never obtained an undue advantage from the company. She dismissed the claim that he was embezzling money from the company. She concluded that the defendants were bona fide directors and shareholders in the company who are entitled to dividends and remuneration since the share transfers were valid.

She ordered July Danobo to render an account of the company to the defendants because he was withdrawing money alone without the others knowing.

Dissatisfied, the plaintiffs (appellants) lodged an appeal before this court advancing eight grounds as follows:

- 1. The learned Judge erred in law and fact when she found as a fact that this action was commenced because of a sour relationship between PW1 and DW1.***
- 2. The learned Judge erred in law and fact when she held that the 1st and 2nd respondents were bonafide shareholders even in the midst of evidence to show that there was a fraudulent transfer of shares.***
- 3. The learned Judge erred in law and fact when she failed to consider the evidence of PW5 as she arrived at her decision.***
- 4. The learned trial Judge erred in both law and fact when she held that it could not be said that form 28 was filed but it was not just found.***
- 5. The learned Judge erred in both law and fact when she held that the 1st and 2nd respondents were bonafide shareholders even when faced with evidence that the 1st and 2nd respondents never paid for their shares.***
- 6. The learned trial Judge erred in law and fact when she up held that the counter claim by the 2nd respondent when she never laid any evidence at trial to support the same.***
- 7. The learned Judge erred in both law and fact when she held that the 2nd respondent was a bonafide shareholder in light of the evidence that she never executed documents of transfer or consent to act as a director.***
- 8. The learned trial Judge erred in law and fact when she held that the sale of used tyres, collection of bus cashing from bus number 24 and the taking of money from the DHL and EMS contracts was an entitlement to DW2.***

To support the grounds of appeal, the appellant's counsel also filed heads of arguments. It is argued in ground one, that the trial Judge erred in law and fact when she found that the action was commenced because of a sour relationship between PW1 and DW1. Contrary to this finding, PW1 (2nd appellant) stated that he sued the defendants because he wanted them to return his shares in the 1st appellant company. Even the pleadings were clear that the action was commenced because of the dispute over shares and not a sour relationship. We are urged to reverse the finding of the trial court as it is unreasonable and perverse.

On ground two it is contended that PW6 an officer from PACRA stated that whenever a transfer of shares is to be effected, the requirement is that Form 27 (referred to as Form 28 by the trial court) should be filed with PACRA and if this not done, then the transfer is void. PW6 stated at page 847 of the Record of Appeal that **"at page 3 of the plaintiffs bundle, Nasser's shares, the effect is that the transfer to Nasser is null and void because form 27 has not been adhered to".**

It is argued that PW4 the son to the company secretary was withdrawn by the Court on its own motion. This was unlike a Court

that is charged with the duty of dispensing justice, as it is not for the Court to choose which witness to listen to. This act amounted to suppressing evidence and as such there was a mistrial and indeed an injustice perpetrated on the plaintiffs.

It was the further submission of counsel that the evidence on the Record of Appeal at pages 625 to 628 in volume 3 of the Record of Appeal shows that there was clear evidence that there was fraud on the part of the defendants as they acquired their shares in the company fraudulently. There was a power of attorney which led to the appointment of the 2nd defendant's mother when, as a proxy at the time, the 2nd defendant was not even a shareholder.

It is submitted that Nasser Ibrahim left employment in the company because money had gone missing and this was stated by PW3 when he stated at page 813 of volume 3 of the Record of Appeal that:

"We told Mr. Danobo that we failed to continue the building because Mr. Nasser had failed to give us K50,000.00 for the building. Later on Mr. Danobo called me to his office in Emmasdale and I found Nasser and Mr. Danobo seated there. Mr. Danobo told me that Nasser told him that we had spent K1.5 Billion because the budget was for K820,000.00. I asked Nasser to produce the original receipts to compare the money that we

had spent. Mr. Danobo pretended to leave his office and I asked Nasser to tell the truth. Nasser's response was to forget about his father."

According to counsel, this evidence was uncontroverted in cross examination and remains as such to date. Therefore, this court could interfere with the finding that the 1st and 2nd respondents were bonafide shareholders as there was an analysis of evidence, which could be considered improper. As an appellate court could come up with our own analysis of the evidence and indeed interfere with the findings/conclusions of the lower court.

The appellants further argue in ground three, that the learned Judge erred in law and fact when she failed to consider the evidence of PW5 as she arrived at her decision.

PW5 Kozhi Kataka, a police officer who received a docket of a complaint from PW1 regarding some fraudulent transfer of shares and embezzlement of funds belonging to the company. PW5 stated that "***Mr. Mukelebai told me that the procedure to transfer the shares was not followed. I also came across a document which showed that Nasser and Olypa were shareholders in 2008 when the alleged transfer of shares was in 2009***". This evidence is contained at page 819 lines

20 to 25 of volume 3 of the Record of Appeal. The witness went on to state at page 820 lines 15 to 25 of volume 3 of the Record of Appeal that, "***I summoned Arthur Kazhila and I recorded a warn and caution statement from him. He was escorted by son Philip Kazhila. After the interview he confessed that the transfer was done without the consent of Mr. July Danobo and he did that on instructions from Nasser Ibrahim and Zubeda his former wife. Mr. Kazhila gave a voluntary confirmation***".

According to counsel this piece of evidence is very important and goes to the root of all allegations that were made against the respondents in this matter. The position that the transfer of shares was not properly done is supported by the evidence of PW6 (appearing as PW5. This evidence was disregarded or not considered by the court below.

In ground four it is contended that the learned trial Judge erred in law and fact when she held that it could not be said that Form 28 was not filed at PACRA but that it was not just found. Reliance was placed on the case of **Minister of Home affairs, the Attorney General v Lee Habasonda (suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes)**¹. It is contended that

the case is a good example of the approach to be taken by an appellate Court when a trial court does not discuss specific issues raised by the parties. In that case it was emphasised 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. Finally, a judgment must show the conclusion. A judgment which only contains a verbatim reproduction and recitals is no judgment."

In addition counsel submits that there is evidence on record that Form 27 (referred to as Form 28 by the trial court) was never filed at PACRA and this evidence came from PW6 (PW5) who came from PACRA. Therefore, it is astonishing that the learned trial Judge failed to review the above evidence from PACRA and went ahead to make a finding on a fact that lacks any backing from the evidence on record. At no point at trial was there any evidence to show that indeed Form 27 was filed at PACRA but it was not just found.

In grounds five and seven it is argued that it is trite law that for there to be a proper transfer of shares, consideration must be made. That **section 57 of the Companies Act**, clearly states that a transfer of shares will take place after an instrument of transfer is

properly executed using the prescribed form, which is Form 27 which indicates that there must be consideration. PW1 testified that he never at any point received any consideration or that any consideration passed from one party to another as regards the shares that were allegedly transferred to the defendants. Indeed DW1 admitted that he never paid for the shares. The court below therefore, erred by finding that the 1st and 2nd defendants were bonafide shareholders when there was no consideration.

In ground six counsel contends that when the defendants filed their defence, the same came with a counter-claim. However, the defendants did not adduce any evidence to support their counter-claim. As such it is ironic that the lower court regardless of this fact went ahead to hold that they had succeeded with their counter-claim.

Counsel argued in ground eight that the complaint that PW1 lodged with the police related to embezzlement of funds belonging to the company and at the hearing, Nasser Ibrahim did not dispute the fact that he got resources belonging to the company without permission or authority. In cross examination he, admitted that no permission was given to him to get the money that he got and

indeed no permission was given to him to sell the used tyres and collect bus cashing from bus number 24. Put simply, Nasser Ibrahim stole this property which belonged to the company.

It was the further submission of counsel that a company acts through a board of directors and makes decisions through resolutions. There is no such resolution on record and neither was there any such evidence adduced at trial to show that he was authorised.

At the hearing of the appeal, Mr. Zimba, augmented the appellant's arguments by submitting there was no evidence adduced regarding the counter-claim by the 2nd respondent Olypa Sibongile Danobo and no witnesses were called. He referred us to our decision in **Finance Bank v Muzeya and four others**² that a party to a case should personally testify.

The appellant's counsel later filed supplementary heads of argument. We note that in the supplementary heads of argument, counsel heavily relies on the provisions of the Companies Act No. 10 of 2017. We wish to point out that the said Act came into force after the cause of action in this matter arose which is sometime in 2008/2009. The Act of 2017 cannot therefore apply in *casu*. We

will therefore stick to the companies Act before the 2017 amendment as it was the applicable law then and even at time of commencement of the action.

The respondents' counsel also filed their heads of argument. In response to ground one, it is submitted that the facts on record clearly led to the conclusion that the action was commenced due to sour relations between the parties. This is a finding of fact which cannot be overtuned, as the court below had sufficient basis for making it especially that the appellants failed to adduce evidence of fraud perpetrated by the respondents.

In grounds two and four it is submitted that the share transfer forms are on record as having been duly executed and filed. The Patents and Companies Registration Agency (PACRA) did in fact register the transfer as shown by the printout from PACRA. It is contended that this is *prima facie* evidence that the transfer was fully effected and the appellants failed to prove that there was any fraud to merit the nullification of the said transfer. The statement made by the official from PACRA that failure to file Form 27 renders the share transfer null and void was not backed by the law and the court made note of this fact in its Judgment.

PW4, (Philip Kazhila) was withdrawn because he did not have personal knowledge of the case and was speaking on behalf of his father who was unwell. Therefore, he could not turn the tide of the case. His evidence had no probative value. However, the Court still took note of his statement in its Judgment.

There was therefore, no suppression of evidence to speak of as the witness did not have any probative evidence to tender and no injustice whatsoever was perpetrated by curtailing his testimony and saving valuable court time. The court made its assessment after hearing him and the appellants cannot hence speak of a mistrial.

It is the further submission of counsel that an allegation of fraudulent transfer of shares does not amount to proof of the same as was held in the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited and others**³ that fraud must be proved and proved beyond a balance of probabilities.

The appellant failed to do so and an appeal cannot cure a failure to present one's case during trial. In the case of **Base Chemicals**

Zambia Limited Mazzanites Limited v. Zambia Air Force and The Attorney General⁴ the Supreme Court held as follows:

"If a party alleges fraud, the extent of the onus on the party alleging it is greater than a simple balance of probabilities..."

A party wishing to rely on the defence of fraud must ensure that it is clearly and distinctly alleged...

When it comes to trial, the party must lead evidence so that the allegation is clearly and distinctly proved...

The defence of fraud or abuse of office was not clearly and distinctly alleged and proved."

According to counsel the contention that the appellants are not bona fide shareholders is therefore, flawed. Firstly, it is on record that even before the increase in the number of shares held by Nasser Ibrahim he was still a shareholder and a founding shareholder of the company. Further, the appellants did not tender sufficient evidence to prove that the subsequent increase in his shareholding was invalid for being fraudulent. The statement by July Danobo at page 794 of the Record of Appeal to the effect that he could not remember whether or not he voluntarily transferred shares to Nasser Ibrahim is insufficient to sustain the allegation of fraud.

As to Olypa Sibongile Danobo, it is argued that the appellants' contention regarding her shareholding seems to hinge upon the fact that she hired a proxy to carry into effect or execute transactions on her behalf. The contention that this fact means that she is not a valid shareholder is purely ludicrous as a person not labouring under any legal incapacity and who can legally enter into a contract can appoint a proxy to act on her behalf.

Learned counsel amplified that the evidence on record is clearly that Olypa Sibongile Danobo hired a proxy to execute the transfer on her behalf and it goes without saying that she was not a shareholder before the transfer. Furthermore, and by July Danobo's own admission, he and Raymond Danobo, PW2, did voluntarily transfer shares to Olypa Sibongile Danobo.

July Danobo, PW1 freely stated during cross examination that:

"I once appointed Zulu and company as my advocates and gave them instructions. At page 159 and 151 of the defendant's bundle, the letter dated 6th July, 2013 states that Raymond Danobo freely pulled out of the company and transferred his shares to his younger sister Olypa. At page 154 of the defendant' bundle of documents (paragraph 2). According to the letter, I gave Olypa shares but I have refused what is stated. I however told him to write this letter. I never reported Mr. Sebastian Zulu SC to LAZ or

the police for misrepresenting my position. (paragraph 4 of the letter at page 154) from my daughter Olypa held shares in Juldan Motors"

Regarding Nasser Ibrahim he stated as follows: (pages 791-792 of the Record of Appeal)

"Before 2004 Juldan Motors was not in existence. It was founded by three shareholders namely myself, Raymond Danobo and Ibrahim Nasser.

We founded the company as a group.

When I started the company I had 1,960,000 in 2004 but according annual return at page 14 my shares were listed as 12,500,000. At page 10 the document dated 27th December, 2006, my shares are listed as 49,000,000.

My shares over time have been changing not because of fraud."

At pages 792-793 of the record, he stated as follows:

"The person who was filing the annual returns was the company secretary and reflecting the status of the company at material times. At page 20 of the plaintiff's bundle, the company secretary wrote a letter to PACRA. Mr. Kazhila did not misrepresent the status of the company"

Finally at pages 793-794 of the record, he stated that:

"At page 30, I have seen my signature on the form of transfer of fully paid shares, in which I transfer 12,000,000 to Olypa Danobo and I signed the document. The shares are held in Juldan Motors Limited. Olypa signed the document below. I did transfer

12,000,000 shares to Olypa. I cannot remember if I transferred 24,500,000 shares to Ibrahim Nasser. At page 33 of my bundle I transferred 24,5000,000 shares to Nasser Ibrahim in Juldan Motors. I signed the documents and the form was stamped by PACRA. My son acknowledged receipt of the transfer."

Reliance was placed on the case of **Selly Yoat Asset Management v Remote Site Solutions Zambia Limited⁵** where it was held that:

"Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary, subtract from or contradict the terms of the written contract..."

The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand..."

The meaning of the document or of a particular part of it is to be sought in the document itself; one must consider the meaning of the word used not what one may guess to be the intention of the parties..."

If there is one thing more than another which public policy requires is that men of full age and competent understanding shall have the utmost liberty in contract when entered freely and voluntarily shall be enforced by courts of justice..."

Counsel concluded that the appellant, therefore, without any evidence of fraud on the part of the defendants cannot now seek to depart from the binding terms of the transfer agreement.

Regarding ground three it is submitted that it is clear from the Judgment that the court below took note of all the evidence presented. The testimony of the PACRA Inspector PW6 did not and could not turn the case in favour of the appellant as the weight of the evidence lay in favour of the defendants. The court duly considered the evidence of this witness.

According to counsel in light of the material misrepresentation in the testimony of PACRA Inspector regarding non compliance, the court was entitled to regard his evidence as unreliable. The other small irregularities relating to the documents were sufficiently explained and the witness under cross-examination conceded that the irregularities did not render the transactions null and void and could easily be rectified.

The trial court was therefore on firm ground when it held that the integrity of the documents in question was not invalidated by the manner in which they were filed at PACRA.

Grounds five and seven are argued on the basis that there is no proposition or principle of law that consideration need be in monetary terms. There need not be consideration where the

transferee is the son or daughter of the transferor and, inter alia, the letter at page 332 of the Record of Appeal clearly indicates that the shares in question were voluntarily given as a gift from July Danobo to Olypa Sibongile Danobo and Nasser Ibrahim is a founding shareholder of the company.

Further, in any event, the court does not concern itself with the nature of and sufficiency of consideration as held in the case of **Finance Bank Zambia Limited v SOCOTEC International Inspection Zambia Limited and another**⁶ that:

"The defendant was remunerated for the services rendered and having has the benefit of the money cannot now be heard to deny the existence of the Collateral Management Agreement..."

Once the offer has been accepted, the offeree cannot revoke the offer and the offeror cannot withdraw the acceptance...

At both common law and equity, the courts do not generally concern themselves with the adequacy of consideration; that is, they make no attempt to audit the bargain made by the parties to see it is a fair one..."

The grounds therefore do not establish that the respondents are not bonafide shareholders as it is evident that the shares were fully paid up. In any event there was no call for the payment of the shares since the company was incorporated and the appellants

cannot at this late stage seek to rely on such a ground. July Danobo himself did not show proof of his payment for the shares and what is good for the goose must be good for the gander.

Counsel contends in ground six that the notion that the claimant needs to testify in the matter in order for judgment to be entered in their favour is a logical fallacy, what is necessary is that evidence or testimony is led in support of a claimant's case.

There was sufficient material before court necessitating judgment being entered in Olypa Sibongile Danobo's favour and she certainly did not need to take the stand in order to advance her case.

The cases cited do not expressly or by inference make it mandatory that the claimant/plaintiff must take the stand in order to lead evidence and an extension of the cases to cover such a proposition would be overstretching the scope intended by the courts in holding specifically as they did in those cases.

Learned counsel further amplified that July Danobo in his testimony at pages 798-799 of the record stated as follows:

"I have been withdrawing huge amounts of money from Juldán Motors. The 1st Defendant is a co-signatory to the company accounts and he did not authorise me to make the withdraws. I have opened a garage in South Africa using Juldán Motors using Juldán Motors money. There is no company resolution authorising me to open other companies. I am the one who makes the money and then I should be able to withdraw it, it is not fraud. I have started working from South Africa. The employees in South Africa have never been changed. There are people from Zambia assisting them. The 1st and 2nd defendants did not give their consent to Raymond to use the company money but I authorised him. Raymond did not acquire the buses ALR 1414, ALR 5942, ALR 8111, ALR 8112 and ALR 8113."

Further, on page 799 of the record, that:

"The company has never paid any dividends or profits. Olypa Danobo and Nasser Ibrahim have never been paid dividends and profits"

And at page 800 of the record, he stated that:

"The defendants were not paid any money because they are the children of the family I used to give them money."

His testimony therefore, without question supported the counter-claim and the evidence led by the defendants in support of their case which largely went unchallenged.

In ground eight it is argued that from July Danobo's own testimony, it is clear that the eighth ground was not under contention before the trial court and there was no proof of this allegation at trial. July Danobo stated at page 795 of the record that:

"I have not come to court to state that any money was stolen from Juldan Motors. I have not come with any audited accounts for the company. As a result, the court cannot determine my loss."

Further, that this was not pleaded or proved by the appellants. The issue of embezzlement or any kind of theft by the respondents was hence not before the trial court. Therefore, as the court was not invited to adjudicate and did not make a finding of fact on the issue, there was nothing in the judgment of the court upon which this ground could stand.

We have considered the arguments and submissions by counsel. The issues this appeal raises are whether the transfer of shares to the respondents was fraudulent. Did July and Raymond Danobo voluntarily transfer the shares to Olypa Sibongile Danobo? Does the failure to file Form 27 (Form 28) render the transfer null and void?

We will consider grounds one, two and three together. We wish to state from the outset that the trial court rightly observed that the company was not run in the usual way. The relationship among the members and directors were close and personal. July Danobo is the father, Raymond is his biological son and Nasser Ibrahim his step son while Olypa Sibongile Danobo is the step daughter. The respondents' mother is July Danobo's ex wife.

Nasser Ibrahim testified that in the past, his step father acknowledged him as a hardworking and dedicated director and that they shared a very close relationship. His step brother, Raymond left the company in 2007 after July Danobo removed him following a quarrel and he was replaced with Olypa Sibongile Danobo. According to Nasser Ibrahim, he differed with his step father because he was supporting his sick maternal biological grandfather. His father disowned him, cut ties and chased him from the company and he has never set foot on company premises since 2013.

He discovered that July Danobo (his father) had been secretly buying buses for his biological son Raymond Danobo behind his back.

PW3 testified that July Danobo was infuriated by Nasser Ibrahim's behaviour of inflating figures for the renovation works which were to be conducted by PW3 although Ibrahim said he had been kicked out by the time PW3 was hired to do the work. The trial court cannot be faulted for stating that the relationships soured amongst the shareholders and directors. This was a finding based on her assessment of the witnesses' evidence and demeanor. As an appellate court we do not have this advantage. We can only overturn findings of fact by a trial court which are perverse and not based on the evidence adduced during trial. In the case of **Malawo (Male) v Bulk Carriers of Zambia Limited**⁷ it was observed that:

"Where questions of credibility are involved, an appellate court which has not had the advantage of seeing and hearing witnesses will not interfere with findings of fact made by the trial judge unless it is clearly shown that the trial court has fallen into error."

PW5 (the police officer) investigated the share transfer. His investigations revealed that the transfer procedure was irregular.

PW1 told him that he signed the share transfer forms but could not remember the content. PW5 said Mr. Kazhila (the company accountant who was unwell) still in employment, was responsible for filing documents at PACRA.

He said Olypa Sibongile Danobo became a shareholder and director in the company before the relevant documents were filed at PACRA. In cross examination, he said the respondents were not responsible for filing documents at PACRA and the Drug enforcement Commission concluded that they were not involved in money laundering. Although PW6, an inspector at PACRA stated that since the companies Form 28 was not filed after allotment, the effect is that no new shares were allotted and the transfer of shares was null and void, he, however, conceded under cross examination that Form 28 could still be filed to regularise the process and that the penalty for non-compliance is a fine. We note that **section 66 of the companies Act** did not nullify a transfer on that basis alone.

The fact that Olypa Sibongile Danobo gave proxy to her mother on 19th February, 2008 but the resolution to give her shares was lodged on 24th June, 2009 does not amount to fraud. The power of

attorney was not used to effect any key signature necessary for the transfer. It was an irregularity that does not however go to prove that the transfer was fraudulent.

In **Sablehand Zambia Limited v Zambia Revenue Authority**⁸ it was held that:

"...Fraud must, once pleaded, be proved on a higher standard of proof than on a mere balance of probabilities because they are criminal in nature..."

And in **Rosemary Phiri Madaza v Awadh Keren Collen**⁹ that:

"A defendant wishing to rely on the defence of fraud must ensure that it is clearly and distinctly alleged. At trial a defendant must lead evidence to clearly and distinctly prove the allegation."

Further in **Nkongolo Farm Limited v Zambia National Commercial Bank Limited and others**² the Supreme Court cited with approval the following passage:

"According to the learned authors of Halsbury's Laws of England 4th Edition volume 16, paragraph 1219:

"...the court has never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes the form of statement that is false or suppression of what is true. The withholding of information is not in general fraudulent unless there is special duty to disclose it"

The share transfers and documentation to alter share capital were all signed by July Danobo, Raymond Danobo and the company Secretary Kazhila. July Danobo (PW1) never complained that his signature had been forged. PW5 the star witness called to prove the fraud said he suspected fraud but said only Kazhila could speak to those matters since he was the one in charge of presenting the documents for filing and was responsible for lodging them.

Nasser Ibrahim said he never gave Kazhila instructions to transfer shares because Kazhila only received instructions from July Danobo. Kazhila was not called to testify and sent his son to do so. Curiously he is still, employed by the company. We are of the considered view that fraud was not proved to the requisite standard. July and Raymond Danobo clearly understood the nature and type of documents they were signing. Even if the forms were blank, they are clearly titled and are one paged. The doctrine of *non est factum* does not apply to them.

PW5 the police officer was called at the instance of the plaintiff and he accused Kazhila as having admitted that the transfer was done without the consent of July Danobo and it was under the

instructions of Nasser Ibrahim and his mother Zubeda, July Danobo's ex wife. Kazhila was not called to testify and he is still employed by the company. Clearly, therefore fraud was not proved.

Additionally, the documentary evidence signed by July, and Raymond Danobo and Kazhila, is contrary to the evidence of the witness. The signatures are not disputed as not having been made or being forgeries. There is little weight to be attached to this evidence.

Court below which had ocular advantage and better placed to assess credibility and weight to be attached gave little credence to it, and rightly so.

In light of the foregoing grounds one, two and three are meritless.

Coming to ground four that the learned trial Judge erred both in law in and fact when she held that it could not be said that Form 28 was not filed but it was not just found. We note that on page J26 that the trial court stated that, the inspector from PACRA testified that the company did not file Form 28 and as a result, the effect is that no shares were allotted. The finding by trial court that

the fact that it was not found at PACRA does not mean that it was not filed is an assumption not supported by the evidence.

However, we opine that the trial court was on firm ground on the effect of non-compliance. **Section 66** pursuant to which the Form is filed is clear that non-compliance is an offence for which the officers responsible for filing may be convicted and fined for each day that the failure continues.

Additionally, the witness from PACRA said the failure to comply had no legal consequences and it could be rectified by simply submitting the Form.

Ground four therefore has merit only to the extent that the court made a finding not supported by evidence as highlighted. However, this partial success has little or no effect on the main issues in contention in this appeal.

We will consider grounds five and seven together as they are related. It is trite that the law does not impose any restriction on transfer of shares in the manner proposed by the appellant. **Section 65 (1) of the Companies Act** states that save as expressly provided in

a company's articles and in this Act, shares shall be transferable without restriction by a written transfer in accordance with **section fifty-seven**. Further, in **subsection (2)** that:

"The articles of a private company shall not impose any restriction on the transferability of shares after they have been issued unless all the shareholders have agreed in writing."

Raymond and July Danobo freely executed the share transfers. It is immaterial that the shares are unpaid for. Nasser Ibrahim admitted that the shares were not paid for. The issue of unpaid shares comes into play to the extent that a company retains a lien on unpaid shares which remain a shareholder's liability.

The need for consideration only arises when the company allots shares to directors and other employees under **section 73 of the Companies Act**, which is not applicable here. The trial court therefore erred to assume that the shares were *gratis* at the company's expense. The shares remain unpaid for which the company has the liberty to make a call whenever it desires. **Section 57** cited by the appellant's counsel simply states that shares are personal property and transferable in nature. **Subsection (2)** provides for the manner of transfer while **subsection (3)** qualifies

subsection (2) in that the procedural issues do not invalidate a transfer. The share transfers in question were freely executed by the transferees and accepted for filing. The instruments were valid. Accordingly grounds five and seven lack merit and are dismissed.

In ground six it is the appellant's contention that the learned trial Judge erred in law and fact when she upheld the counter-claim by the 2nd respondent when she never laid any evidence at trial to support the same.

In *casu*, DW1 Nasser Ibrahim testified. The nature of the counter-claim is such that it was made by himself and Olypa Sibongile Danobo.

In the case of **Finance Bank v Muzeya and four others**² cited by Mr. Zimba, the plaintiff witnesses who testified did not say that they were doing so on behalf of the other plaintiffs. Similarly, we note that DW1 did not state that he was testifying on behalf of the 2nd respondent. However, the nature of this case is such that the plaintiffs' (appellants) claim that the defendants were not directors and bonafide shareholders failed. We have already determined that

the defendants are bonafide shareholders and the transfer of shares to them was properly done. The failure of the plaintiffs' case entitled the defendants to most of their counter-claims. Furthermore, the issue of July Danobo accounting to the company does not personally affect Olypa Sibongile Danobo but the company as well as Nasser Ibrahim and other members. Therefore ground six equally fails.

We are inclined to allow ground eight. **Section 22 of the Companies Act Provides** that:

"(1) a company shall have, subject to this Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual."

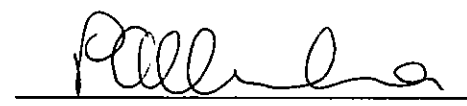
This means that the company has capacity to own property just like an individual. Nasser Ibrahim who testified as DW1 stated that the property in question belonged to the company. Although Nasser Ibrahim was a shareholder, there is a system through which shareholders reap the benefits from the company, example through dividends. He could not, without, the property being given to him following a resolution after a duly constituted meeting, simply get the company property for his own benefit.

He was deriving an undue benefit for which he must account. The fact that July Danobo let him have the property does not make it right for him to use company property for personal needs.

The trial court erred when it found that Ibrahim did not obtain an undue pecuniary advantage from the company. We find that this issue though not pleaded was let in evidence. Nasser Ibrahim was cross examined over the same and he admitted. It is settled law that where issues not pleaded are let in evidence, without objection, the court is not precluded from considering them. See **Mwanawasa and others v Mazoka and others**¹³. Accordingly we find merit in ground eight and it is allowed. This entails that Nasser Ibrahim should equally account to the company for monies collected from bus 24 and other goods he got without resolution of the company. This appeal having substantially failed, we order each party to bear own costs in this Court and below costs to the respondents, as ordered, to be taxed failing agreement.


J.Z. MULONGOTI
COURT OF APPEAL JUDGE


D.L.Y. SICHINGA
COURT OF APPEAL JUDGE


P.C.M. NGULUBE
COURT OF APPEAL JUDGE