IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO.163 OF 2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

DATONG CONSTRUCTION **APPELLANT**

AND

FRASER ASSOCIATES (Suing as a firm) **RESPONDENT**

CORAM: Chashi, Makungu and Lengalenga, JJA

ON: 19th November, 2019 and 13th March, 2020

For the Appellant: *B. Mwiinga, Messrs Isaac & Partners*

For the Respondent: *T. Sakala, Messrs Fraser Associates*

JUDGMENT

CHASHI, JA, delivered the Judgment of the Court.

Cases referred to:

1. ***The Rating Valuation Consortium and D.W Zyambo & Associates (Suing as a firm) v The Lusaka City Council and Zambia National Tender Board (2004) ZR, 109***
2. ***Remmy Kabanda Kaindu Mushota v The Law Association of Zambia (1985) ZR, 146***
3. ***Abel Banda v The People (1986) ZR, 105***
4. ***Ituna Partners v Zambia Open University Limited – SCZ Appeal No. 117 of 2008***
5. ***Lewanika and Others v Frederick Titus Chiluba – SCZ Judgment No. 14 of 199***
6. ***Anderson Kambela Mazoka and 2 Others vs Levy Patrick Mwanawasa and 2 Others (2005) ZR, 138***
7. ***Sentor Motors Limited and Three (3) Other Companies, In Re: The Companies Act - SCZ Judgment No. 9 of 1996***
8. ***Wilson Masauso Zulu v Avondale Housing Project (1982) ZR, 172***

9. *The Attorney General v Aboubacar Tall and Zambia Airways Corporation Limited (1995) ZR, 138*
10. *Admark Limited v Zambia Revenue Authority (2006) ZR 43*
11. *Freeman and Lockyer v Buckhurst Park Properties (Magnal) Ltd (1964) 2 QB 480.*
12. *Ginty v Belmont Building Supplies Ltd [1959] 1 All ER 414*
13. *Phiri v Bank of Zambia – SCZ Judgment No. 21 of 2007*
14. **Great Eastern Rly Co v Turner (1872) LR 8 Ch App 149**
15. *Royal British Bank v Turquand (1856) 6 E & B 32*
16. *Mahony v East Holyford Mining Company (1875) LR 7 HL 869*
17. *Zambia Bata Shoe Company Limited v Vin-Mas Limited (1993 - 1994) ZR, 136*
18. *National Airports Corporation Limited v Reggie Ephraim Zimba And Savior Konie (2000) ZR, 154*
19. *B Ligget (Liverpool) Limited v Barclays Bank Limited (1928) 1 KB 28*

20. ***Brook Ltd V Claude Neon General Advertising Ltd (1931) 2 DLR 743***
21. ***Indeco Estates Development Company Ltd v Marshall Chambers – SCZ Judgment No. 4 of 2002***

Legislation referred to:

1. ***The Legal Practitioners Rules, 2002 - Statutory Instrument No. 51 of 2002***
2. ***The Companies Act, Chapter 388 of the Laws of Zambia***

Other works referred to:

1. ***Mumba Malila, Commercial Law in Zambia: Cases and Materials (Lusaka, UNZA Press, 2006).***
2. ***Paul L. Davies, Gower and Davies' Principles of Modern Company Law, 7th Edition, London: Sweet & Maxwell, 2003.***

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of the High Court, Commercial Division, delivered by the learned Lady Justice Dr. W.S. Mwenda on 17th April, 2019.

1.2 In the said Judgment, the learned Judge ruled in favour of the Respondent and ordered that the Appellant pay the Respondent USD 236,571.30 being legal fees due to the Respondent for services rendered to the Appellant between December, 2015 and 30th April, 2016.

2.0. BACKGROUND

2.1 The background to this case in a nutshell, is that, the Appellant had advanced the sum of USD 6,000,000.00 to a company called Yangst Jiang Enterprises Limited (hereinafter referred to as YJEL) on 24th March 2014, on a short-term basis.

2.2 When it became apparent that YJEL would not be able to pay back the monies, the Appellant resolved to petition the winding up of YJEL by liquidation, in order to recover the debt from the assets. On 1st December, 2015, the Appellant wrote a letter appointing the Respondent as its lawyers. The letter requested for the Respondent to confirm by return mail, if they accepted the appointment.

2.3 In return, the Respondent advised the Appellant in writing that, there would be need to securitise the loan by way of a debenture before proceeding to the winding up process. The Respondent further advised that for them to carry out the instructions, they would need a board resolution, appointing and authorizing them to act for the Appellant.

2.4 The letter also contained the proposed legal fees which the Appellant needed to agree on in order for the works to be activated. The letter concluded as follows:

> "***As agreement to the terms hereof, please date, enclose and return the enclosed copy of this letter.***"

The Appellant dated, endorsed and returned the copy of the letter to the Respondent on 7th December, 2015.

2.5 The Appellant subsequently paid a deposit of K50,000.00 towards the legal fees. The Respondent then proceeded to prepare and register the debenture over the assets of YJEL and issued a bill of USD 236,571.00 to the Appellant. The Respondent further instituted winding up

proceedings and issued a bill based on a fixed monthly retainer of K15,000.00 which amounted to K75,000.00.

2.6 Following the issuance of the said bills, the Appellant refused to honour the bills alleging that the Respondent acted without instructions from it as there was no board resolution. That, if anything, the bill for the debenture was to be paid by YJEL in accordance with clause 12 of the debenture agreement.

2.7 Dissatisfied with the Appellant's response, the Respondent instituted proceedings against the Appellant in the court below.

3.0 CASE BEFORE THE LOWER COURT

3.1 The claim by the Respondent was by way of Writ of Summons seeking the following reliefs:

(a) Payment of the sum of US$ 236,571.30 and ZMW 75,000.00 being in respect of legal services rendered unto the Defendant between the period December, 2015 to 30th April, 2016.

(b) Interest at the current commercial bank lending rate from date of claim until complete payment.

(c) Any further relief that the court might deem fit.

(d) Costs.

3.2 The Respondent's claim was substantially that, the Appellant engaged the Respondent firm to provide legal services and a retainer agreement was executed. The Plaintiff alleged that, it issued the Appellant with bills for the services rendered and despite lawful demands, the Appellant has refused or neglected to settle the same. As a result, the Respondent has suffered loss and damage.

3.3 The Appellant settled their defence and denied the Respondent's claims, alleging that no board resolution was passed appointing and authorizing the Respondent to act as the Appellant's advocates.

3.4 In addition, the Respondent denied having signed a retainer agreement with the Respondent and averred that, they were not bound by the terms contained therein. The Appellant further averred that, the Debenture agreement prepared by the Respondent was executed by YJEL and as such, YJEL is the right party to settle the Respondent's bill and not the Appellant.

All in all, the Appellant alleged that, the Respondent acted without instructions and as such, the Appellant is not liable to pay the legal fees being demanded by the Respondent.

3.5 In reply, the Respondent averred that, the passing of the board resolution was an internal affair of the Appellant Company and that the failure to pass such a resolution could not affect the Respondent, as a third party.

3.6 The Respondent asserted that, the Appellant acknowledged the terms of service as per the Respondent's letter of 1st December, 2015 and that by conduct, the Appellant is estopped from denying being bound by the terms contained in the retainer.

3.7 With regard to the Debenture agreement, the Respondent averred that, they were not party to the agreement and pleaded privity of contract. According to the Respondent, it was not privy to the arrangement made between the Appellant and YJEL and that if the Appellant enjoyed an indemnity, such indemnity had nothing to do with the retainer between the Appellant and the Respondent.

4.0 FINDINGS OF THE LOWER COURT

4.1 After consideration of the pleadings, the evidence and arguments by the parties, the learned Judge in the court below formulated five (5) issues for determination; namely:

(a) Whether the signing by the Appellant, of the letter dated 1st December, 2015, from the Respondent amounted to an acceptance of the Respondent's terms for purposes of engaging it as advocates.

(b) The effect of the Appellant's failure to pass and present a board resolution to the Respondent, appointing and authorizing the Respondent to act as the Appellant's lawyer.

(c) The effect of the Appellant's subsequent conduct of paying a deposit towards the legal fees as proposed by the Respondent in the letter dated 1st December, 2015, from the Respondent to the Appellant.

(d) The effect of the Respondent proceeding to perform the terms in the letter of 1st December, 2015, from

the Respondent to the Appellant, without a board resolution from the Appellant; and

(e) Whether the Appellant can rely on clause 12 of the Debenture agreement to sustain the argument that the party liable to pay the legal fees due to the Respondent, if any, is YJEL.

4.2 As regards, the first issue, the learned trial Judge found that, it was not in dispute that a letter from the Respondent to the Appellant was written on 1st December, 2015 and that the same was signed and endorsed as received. She opined that upon a perusal of the letter, the dating and endorsing of the letter by return mail from the Respondent could not lead to the irrefutable inference that it was an instrument by which the Appellant intended to appoint the Respondent as Advocates.

She was of the view that, the letter contained mere proposals requiring further action by the Appellant, which action could not be deemed to have been taken by

merely signing the letter as received or as agreement to the proposals therein.

4.3 In dealing with the second issue; which is the absence of a board resolution appointing and authorizing the Respondent to act as the Appellant's Advocates, the learned Judge opined that, directors are agents of the company, whose acts are authorized by board resolutions as and when they are passed and that this is a matter of internal concern to the company.

The Judge went on to state that, whether the agent's authority is actual or apparent is immaterial where the principal is known and conducts himself in a manner that demonstrates that he has given the agent apparent authority to act on his behalf and the third party normally relies upon the apparent authority of the agent.

4.4 The learned Judge noted that, it was the agent signing all the letters and he also admitted in his evidence to the payment of the deposit towards the legal fees.

In the circumstances, the learned Judge took the view that, the passing of the board resolution was an internal

matter and did not affect the Respondent as an outsider and in her view, it was only reasonable for the Respondent to infer that the directors in the Appellant Company had the authority to retain the Respondent as advocates. She opined that the concept of apparent authority placed no obligation on the Respondent or a third party to receive such resolution.

4.5 With regard to the third issue, the learned Judge found that, it had been established through the evidence of DW1 and DW2 that a deposit was paid towards the legal fees subsequent to the letter of 1st December, 2015 and that, it is this conduct of paying the deposit that required to be examined. She found that, whilst the Appellant insisted that it approached the Respondent solely on behalf of YJEL and that the deposit was fully financed by YJEL, no evidence was adduced to prove the same.

That it was clear from the evidence on record, vide letter of 1st December, 2015, that it was the Appellant who sought to retain the Respondent as advocates and not YJEL and by its conduct after the letter from the

Respondent, any reasonable person would believe that the Appellant was assenting to the retention of the Respondent.

4.6 On the issue of offering services without instructions from the client, the learned Judge observed that, whilst it is true that a practitioner cannot offer services without instructions from a client, the situation obtaining in the instant case is different as it revolved around the law of agency. The learned Judge took the view that, the course to be employed by the Appellant in this case is to ratify the acts done by the Appellant's directors on behalf of the Appellant. She opined that the prerequisites of ratification had been satisfied and ordered that the technical defect of the lack of a board resolution be cured by ratification.

4.7 On the reliance by the Appellant on clause 12 of the Debenture agreement; that the party liable to pay the legal fees due to the Respondent is YJEL, she found that as conceded by DW1, the Respondent was not a party to

the Debenture agreement and emphasized the principle of privity of contract.

4.8 The Judge further found that, there was no value in the letter of YJEL in which they attempted to assume a role between the Respondent and the Appellant to which it was not privy.

5.0 DECISION OF THE COURT BELOW

5.1 In view of the foregoing, the learned Judge entered Judgment for the Respondent in the sum of USD 236,571.30, being the legal fees due to the Respondent for legal services rendered to the Appellant between December, 2015 and 30th April, 2016, with the exception of the instructions pertaining to the commencement of the creditors' winding up proceedings under Cause No. 2015/HP/2392 before a different Judge.

5.2 She awarded interest at 12 % per annum being the average of United States Dollars current lending rate of Standard Chartered Bank of Zambia, Stanbic Bank Zambia and First National Bank Zambia from the date of the Writ of Summons until full payment.

5.3 The learned Judge further ordered the Appellant to ratify the acts done by the Appellant's directors within fourteen (14) days from the date of the Judgement.

6.0 GROUNDS OF APPEAL

6.1 Disenchanted with the Judgment, the Appellant has appealed to this Court advancing five grounds of appeal couched as follows:

1. **The High Court erred both in law and fact when it held that the Defendant had unambiguously assented to the Plaintiff's proposal by signing the return copy letter containing the proposal.**
2. **The High Court erred both in law and fact when it relied on the precedent in support of its Judgment when the case is no longer good law considering the provisions of The Legal Practitioners Rules of 2002, Rule 16(3).**

3. **The High Court erred in both law and fact when it awarded a Judgment in favour of the Plaintiff who failed to prove that they had the authority to act for the Appellant on the basis of the pleadings and evidence before court.**

4. **The High Court erred in both law and fact when it abdicated its role to determine all the issues on record that were not pleaded by the Defendant and not objected to by the Plaintiff.**

5. **The High Court erred in both law and fact when it held that the Defendant had assented to the Plaintiffs terms when the court failed to find the Plaintiff in breach of the agreement as held by the court.**

7.0 ARGUMENTS IN SUPPORT OF APPEAL

7.1 At the hearing of the appeal, Mr. Mwiinga, Counsel for the Appellant, relied on the Appellant's heads of argument. In arguing the first ground of appeal, Counsel submitted that, it has never been a principle of the law of contract, that signing a return copy of any document was

tantamount to acceptance of an offer or proposal. In support of this position, we were referred to the case of **The Rating Valuation Consortium and D.W Zyambo & Associates (Suing as a firm) v The Lusaka City Council and Zambia National Tender Board**[1] where the Supreme Court held as follows:

> *"What should guide the court in analyzing business relationships should be whether or not the parties' conduct and communication between them amounted to an offer and acceptance. What is regarded as an important criterion is for the court to discern a clear intention of the parties to create a legally binding agreement between themselves. This can be discerned by looking at the correspondence and the contract of the parties as a whole."*

7.2 It was submitted that, there was no existing contract between the parties, as they were still negotiating the terms of the contract and that it was never the intention of the Appellant that by merely signing the return copy of

the Respondent's letter, it had accepted the proposals contained therein and a contract was formed.

7.3 We were further, referred to the case of **Abel Banda v The People**[2] for the position that, in order to have certainty, decisions of courts ought to be consistent and not so readily changeable. According to Counsel, the lower court failed to abide by the judicial precedent of *stare decisis.*

7.4 In arguing ground two, the Appellant faulted the trial court's reliance on the case of **Remmy Kabanda Kaindu Mushota v The Law Association of Zambia**[3] and submitted that, the said case had been overtaken by Rule 16(3) of **The Legal Practitioners Rules**[1], which states that:

> *"A practitioner shall not offer services without instructions from a client."*

The Appellant argued that, the aforecited provision, is couched in obligatory terms and does not provide for any exceptions. According to the Appellant, there is no evidence on record to show that the Respondent acted

with instructions and as such, the Respondents are in violation of the aforecited provision. To further buttress this argument, we were referred to the case of **Ituna Partners v Zambia Open University Limited.**[4]

7.5 Based on the foregoing authorities, Counsel argued that, the Respondent acted without instructions from the Appellant and therefore acted irregularly.

7.6 The gist of the argument in ground three is that, the Respondent failed to prove that they had authority to act for the Appellant. It was submitted that, it is a cardinal principle of law that for a party to succeed in a matter, that party ought to prove his case on a balance of probability. In support of this position, the Appellant cited several cases, amongst them, **Lewanika and others v Frederick Titus Chiluba**[5] and **Anderson Kambela Mazoka and 2 others vs Levy Patrick Mwanawasa and 2 others**[6]

7.7 Counsel further, implored this Court to take judicial notice of the fact that, a company operates through resolutions and that in the instant case, there was no

resolution passed appointing and authorising the Respondent to act on behalf of the Appellant. Mr. Mwiinga, drew our attention to the evidence of the Respondent's witness appearing at page 228 of the record, where he conceded that they did not receive any resolution giving authority to the Respondent to act on behalf of the Appellant.

7.8 With regard to ground four, it is the Appellant's argument that, it was a misdirection on the part of the court below when it failed and/or neglected to determine all issues that were before it. It was contended that the court below failed to adjudicate on the issue of the breach of Rule 16(3) of **The Legal Practitioners Rules**[1] to the effect that a legal practitioner cannot offer services without instructions from a client and Rule 41 which provides that:

> *41. Non-compliance, failure, evasion or disregard of these rules without reasonable cause shall constitute professional misconduct or conduct unbefitting a practitioner in terms of Section 53(ii) of the Act.*

7.9 The cases of **Sentor Motors Limited and Three (3) Other Companies,[7] Wilson Masauso Zulu v Avondale Housing Project[8]** and **The Attorney General v Aboubacar Tall and Zambia Airways Corporation Limited[9]** were cited where the Supreme Court held that, it is the duty of the Court to adjudicate all matters brought before it.

7.10 It was argued that, there being no reasonable explanation from the Respondent for acting without instruction, the lower court ought to have found them wanting. It was therefore, erroneous for the court below to fail to adjudicate on the issue of breach of Rule 16(3) of **The Legal Practitioners Rules[1]**.

7.11 As regards the fifth ground of appeal, the Appellant argued that, the lower court having found that there was a contract between the parties, it ought to have found that the Respondent breached the terms of that agreement, which was to the effect that a board resolution had to be passed appointing and authorizing the Respondent to act on behalf of the Appellant. That in

the absence of the board resolution, the Respondent firm acted without authority from the Appellant and breached the provisions of **The Legal Practitioners Rules.**[1]

7.12 On the strength of the foregoing arguments, Counsel for the Appellant urged us to allow the appeal.

8.0 ARGUMENTS OPPOSING THE APPEAL

8.1 In response, Ms. Sakala, Counsel for the Respondent equally relied on the Respondent's heads of argument.

8.2 Counsel submitted that, the Appellant gravely misread and misinterpreted the Judgment of the court below. In support of this argument, our attention was drawn to pages J27 and J34 of the Judgment of the court below regarding the letter in issue. According to the Appellant, the letter in contention was at the core of the dispute between the parties and the lower court in arriving at her decision, examined the contents of the letter and the effects thereof and drew her own conclusion upon the evidence presented to her.

8.3 According to the Respondent, the evidence presented before the court revealed that, from the Appellant's

conduct, the only reasonable inference that could be drawn is that the Appellant had the intention to create legal relations. That it was the Appellant that initiated the communication by approaching the Respondent and soliciting for its services and the Respondent accordingly provided the said services for the benefit of the Appellant without any rebuff from the Appellant.

8.4 It was further argued that, the correspondence between the Appellant and the Respondent was on the parties' official letterheads and showed a clear intention that all communication was meant to be relied upon by the parties, which according to Counsel, is consistent with the practice in the world of commerce. It was argued that in the instant case, not only was there an intention to bind the parties in their communication but also to create a lawyer-client relationship.

8.5 With regards to the issue of *stare decisis*, the Appellant submitted that, while there is need for consistency, every case ought to be determined on its own merit, in

consideration of all the facts and evidence presented before the court.

8.6 Coming to ground two, it was submitted that, the issue of the learned Judge's reliance on the **Remmy Mushota Case**[3] does not arise in relation to the provisions of **The Legal Practitioners Rules**[1]**.** It was argued that, it was clear from the evidence on record that the Appellant approached the Respondent firm with its request to appoint the firm as its Advocates as evidenced by the letter at page 116 of the record and the Respondent's confirmation of the appointment was by way of the letter at page 117 of the record.

According to Counsel, **The Legal Practitioners Rules**[1] do not prescribe the manner in which instructions ought to be drawn and as such, even the Appellant's letter of 1st December, 2015 sufficed.

8.7 Counsel then went on to distinguish the case of **Ituna Partners v Zambia Open University Limited**[4] relied upon by the Appellant from the instant case stating that in the former case, the lawyers instituted an action

without the company's appointment while in the present case, the Respondent was duly appointed and there was evidence pointing to the specific work the Respondent was instructed to do. Further that, there is nothing on record to show that the Respondent did not receive any instructions to do any work on behalf of the Appellant.

8.8 In response to ground three, Counsel emphasised the role and function of pleadings in civil matters and called into aid the case of **Admark Limited v Zambia Revenue Authority.**[10] It was submitted that the Respondent's pleadings complied with the purpose and function of pleadings as stated in the above authority. Counsel submitted that, the trial Judge addressed her mind to the pleadings and the evidence presented and as such, was on firm ground in her findings.

8.9 Counsel further submitted that, it is an established rule that directors manage the day to day affairs of the company and that once a third party has dealings with any of the directors, the third party is not expected to have knowledge of the irregularity of the director's

authority. We were referred to Section 203 of the repealed **Companies Act[2].**

8.10 It is Counsel's view that, in the likely event that it is found that the Appellant's director did not have the power to issue an instruction for appointment of the Respondent as the Appellant's advocates, the lack of authority was not a concern of the Respondent. Reliance was placed on the case of **Freeman and Lockyer v Bukhurst Park Properties (Mangal) Ltd.**[11] According to Counsel, all that the Respondent was entitled to do was prove that it received an instruction from the Appellant which was duly authenticated by any of the Appellant's directors. which instruction was recognised by the Appellant's own director at pages 243 and 244 of the record.

8.11 It was further submitted that, the trial Judge's decision to order ratification was based on the established legal principle that the acts of an agent such as a director can be ratified once made and to bring to completion the intentions of the parties.

8.12 With regards to the Appellant's invitation to this Court to take judicial notice of the fact that a company operates through resolutions, it was submitted that the Appellant was intentionally ignoring the role of a director in a company and attempting to rely on its own default and the absence of a board resolution which cannot be supported at law. We were referred to the case of **Ginty v Belmont Building Supplies Ltd**.[12]

8.13 It was argued that, the onus was on the Appellant to show that the Respondents were aware of special circumstances showing that the Appellant's director has no authority to appoint the Respondent firm as the Appellant's advocates. It was submitted that, the Appellant failed to prove this. In support thereof, Counsel referred us to the evidence of DW1 at page 244 of the record where he stated that the deposit paid by the Appellant towards the legal fees was not funded or financed by YJEL as alleged by the Appellant.

8.14 Grounds four and five were argued together. It was argued that the Appellant was attempting to argue that it

pleaded issues of compliance with Rule 16 of **The Legal Practitioners Rules**[1] and led evidence to that effect. Counsel contended that, the Appellant's defence, revealed that this was not the case and no evidence was adduced regarding the said rule. Counsel contended that, in fact the issue was only raised by the Appellant for the first time in its submissions in the court below and the same was addressed by the Respondent's submissions in reply found at page 198 of the record and that the Appellant cannot now raise this argument before us. Reliance was placed on the case of **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others.**[6]

8.15 It was further submitted that, nothwithstanding the Respondent's objection in the court below, the learned trial Judge did consider the Appellant's argument at page 42 of the record and as such the Appellant cannot argue that the lower court failed to take into account its arguments. That there was no abdication or misdirection on the part of the lower court. We were referred to the case of **Phiri v Bank of Zambia**[13]**.**

8.16 With regard to the allegations of breach of contract, it was submitted that this was an issue that was not pleaded in the court below and the Appellant is attempting to raise the issue rather too late in the day and is legally debarred from doing so. It was submitted that the trial court adequately addressed its mind to the evidence given by the Respondent and was on firm ground in her findings and Judgment.

8.17 With those arguments, we were urged to dismiss the appeal.

9.0 ARGUMENTS IN REPLY

9.1 The Appellant did file a reply to the Respondent's heads of argument, which the Appellant's Counsel also relied on. A perusal of the same shows that the Appellant in reply, merely reiterated its submissions in support of the appeal and we see no need to recapitulate the same.

10.0 DECISION OF THIS COURT

10.1 We have seriously considered the appeal together with the arguments in the respective heads of argument and

the authorities cited. We have also considered the Judgment of the learned Judge in the court below.

10.2 The first ground of appeal alleges that the learned Judge erred when she found that the Appellant had unambiguously assented to the Respondent's proposal by signing the return copy of the Respondent's letter containing proposals.

10.3 A perusal of the lower court's Judgment and as rightly argued by the Respondent, shows that the Appellant misconstrued the decision of the lower court. No finding was made to the effect that signing of the Respondent's letter amounted to the Appellant assenting to the terms contained therein. Contradistinctively, and as earlier alluded to under paragraph 4.2, the trial Judge found that the act of signing the letter did not amount to an acceptance of the Respondent's terms for purposes of engaging it as advocates.

It is not evident as to what Counsel for the Appellant intends to achieve under this ground, as the learned Judge did agree with the Appellant's position regarding

the signing of the letter. This is what the learned trial Judge had to say at page J27 of the Judgment:

> *"This begs the question, does a proper construction of the letter lead to the irrefutable understanding that it was the instrument by which the Defendant intended to appoint the Plaintiff as its advocates? In my opinion, the key phrases outlined above clearly demonstrate that this question cannot be answered in the affirmative.*
>
> *It appears to me that the instrument of appointment would be the resolution requested by the Plaintiff and not the signing of the document in which such resolution is requested...*
>
> *Further, the endorsement requiring the Defendant to sign and return a copy to the Plaintiff does not help the Plaintiff's position that the letter is itself the retainer. As stated above, the letter is containing proposals which, in my view, are summoning further action by the Defendant, which action cannot be deemed to have been taken by merely signing the*

letter whether as received or as agreement to the proposals therein."

10.4 The above excerpt of the Judgment, shows that the learned Judge addressed the issue at length before arriving at her decision. It is very clear and unambiguous as to the effects of the Appellant signing and endorsing the copy of the Respondent's letter. As rightly, found by the trial Judge, the letter contained mere proposals which required further action on the part of the Appellant. The Appellant's first ground of appeal is a clear misapprehension of the holding of the learned Judge and therefore it is bereft of merit and fails.

10.5 We will consider grounds two, three, four and five together as they are entwined. The issue they raise is whether the trial Judge was on firm ground in holding that the Respondent was sufficiently instructed, in the absence of the board resolution appointing and authorising the Respondent firm to act on behalf of the Appellant Company.

10.6 The gravamen of the Appellant's argument in support of the said grounds of appeal is that, in the absence of a board resolution, the Respondent had no lawful authority or mandate to prepare and register the debenture deed neither did they have the mandate to take out any proceedings on behalf of the Appellant. The Appellant argues that this was a clear violation of Rule 16(3) of **The Legal Practitioners Rules**[1] which clearly states that a practitioner cannot offer services to a client without instructions.

Conversely, the Respondent relied on the doctrine of indoor management and submitted that the passing of the board resolution was an internal matter and not a concern of a third party. According to the Respondent, as a third party dealing with the Appellant Company, they were entitled to presume that there had been proper compliance with the Appellant's internal procedures and a board resolution passed to that effect.

10.7 It is trite law that a company being an artificial legal person, does not physically exist and as such, it has to

act through the medium of human beings; its shareholders and board of directors. The recognised means by which they operate is by way of resolutions.

10.8 The directors manage the day to day activities of the company and this includes the appointment of advocates. The directors, therefore, have the ability to enter into legal relationships with third parties on behalf of the company and consequently bind the company. They are effectively the agents of the company and it is for this reason that the law of agency has to be applied in all company transactions. In the case of **Great Eastern Rly Co v Turner**[14]**,** Lord Selborne LC stated that:

> *"The directors are the mere trustees or agents of the company...trustees of the company's money and property...and agents in the transactions which they enter into on behalf of the company."*

According to Mumba Malila, on **Commercial Law in Zambia Cases and Materials** at page 50:

"The key features of any agency relationship, is the power of the agent to affect the principal's legal position vis a vis third parties."

10.9 Connected to this agency relationship, is the principle of the indoor management rule, popularly known as the Turquand's rule, which is a fundamental tenet of the law of agency and it is concerned with the protection of outsiders against the actions of the company. This rule has its genesis in the case of **Royal British Bank v Turquand**[15], where it was held that an outsider contracting with a party in good faith is entitled to presume that the internal regulations and procedures have been complied with and will not be affected by irregularities of which they had no notice.

This rule is basically the presumption of regularity and it was formulated in order to keep an outsider's duty to inquire into the affairs of a company within reasonable bounds.

10.10 The House of Lords further endeavored to explicate the Turquand rule in the case of **Mahony v East Holyford**

Mining Company[16], where Lord Hatherley stated as follows:

> *"...after that all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and known to them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles or bylaws...when there are persons conducting the affairs of the company in a manner which appears to be perfectly in consonance with the articles of association, then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that of which only they can have knowledge, namely the external acts, are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed."*

10.11 The law as discussed above has been adopted by the Supreme Court in this jurisdiction in a raft of authorities such as **Zambia Bata Shoe Company Limited v Vin-Mas Limited**[17] where the Supreme Court held as follows:

> *"(i) That the company's authorised agents bound the company to comply with the contract and such liability cannot be avoided."*

Further, in the case of **National Airports Corporation Limited v Reggie Ephraim Zimba And Savior Konie**[18], the Supreme Court held as follows:

> *"(1) An outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction."*

10.12 However, it is also important to note that the doctrine of indoor management is subject to certain exceptions; where the third party had actual knowledge of the irregularity or deficiency in authority, or if the circumstances surrounding the contract or transaction are suspicious, which ought to have put the third party

on notice to inquire into the actual authority. In the case of **B Ligget (Liverpool) Limited v Barclays Bank Limited**[19] Justice Wright stated as follows:

> *"The rule proceeds on a presumption that certain acts have been regularly done and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule."*

Further in the case of, **Brook Ltd V Claude Neon General Advertising Ltd,**[20] it was held that:

> *"I am inclined to agree with the argument of counsel for the defendant company...that there was something so out of the ordinary in one company undertaking to purchase the entire outstanding stock of another as to put the plaintiffs upon inquiry to ascertain whether the person or persons making the contract had any authority in fact to make it."*

10.13 Having extensively dealt with the law, we can now apply it to the facts of this case. A review of the evidence, shows that, it is not in dispute that the Appellant, vide a letter dated, 1st December, 2015, demonstrated its intention to appoint the Respondent firm as its advocates and requested that the Respondent confirm by return mail if they accepted the appointment as the Appellant's advocates. It is also not in dispute that, in a letter of even date, the Respondent informed the Appellant, *inter alia,* that in order for them to act on their instructions, a board resolution had to be passed appointing and authorising the Appellant to act on behalf of the Appellant.

It is also not in dispute that a deposit was subsequently paid towards the legal fees by an agent of the Appellant Company and the Respondent proceeded to file and register the debenture in favour of the Appellant and commenced winding up proceedings against YJEL.

10.14 We note that, the lower court in arriving at its decision, found as a fact that there was no board resolution

appointing and authorising the Respondent firm to act on behalf of the Appellant. The learned Judge was of the view that the passing of the resolution was an internal matter of the company and not a concern of the third party. She proceeded to examine the behavior of the Appellant after the Respondent's letter of 1st December, 2015 and opined that the Appellant's conduct of paying a deposit fee towards the legal fees indicated that the Appellant had accepted the Respondent's terms of engagement and it is based on this deposit that the Respondent's proceeded to act on the Appellant's instructions.

She further found that the directors of the Appellant Company, signed the letter of 1st December, 2015 and in their evidence, DW1, the managing director of the Appellant Company confirmed that a deposit had been paid towards the legal fees.

At the end of the day, the learned Judge found that the Respondent had a clear right to relief.

10.15 A careful perusal of the Judgment shows that the learned Judge dealt exhaustively with the issues raised under these grounds of appeal and we are inclined to agree with the approach adopted by her in arriving at the decision.

The Managing director of the Appellant Company signed off on the letter of 1st December, 2015, which letter was on the Appellant's official letter head and by that letter, intended to appoint the Respondent firm as the Appellant's advocates. In addition to this, the managing director in his evidence confirmed that a deposit had been paid towards the legal fees as requested by the Respondent firm. This clearly shows that the directors of the Appellant Company were acting as agents of the Company and being agents, had the power to affect the Appellant's legal position in relation to the third party, being the Respondent firm. By the actions of the directors, the Appellant had consented to the directors having the power to bind the Company.

10.16 In addition, the appointment of advocates is within the normal duties of directors of a company and as such when the Respondent received the letter of appointment and subsequently, a deposit towards the legal fees, the only inescapable inference was that, they were dealing with a representative of appropriate authority or standing for the particular type of transaction. There was nothing out of the ordinary to have put the Respondent on inquiry. Therefore, based on the **Freeman and Lockyer v Buckhurst Park Properties (Magnal) Ltd**[11], the Respondent was entitled to assume the apparent or ostensible authority of the agents to be real or genuine and that they had the power to represent the Appellant Company.

10.17 We cannot fault the learned Judge for finding that the directors of the Appellant Company had authority to act on behalf of the Appellant Company and the Respondent had the right to rely on the ostensible authority of the agent.

10.18 Coming to the main issue being the absence of the board resolution mandating the Respondent firm to act on behalf of the Appellant, as earlier alluded to, directors are a governing body and are responsible for making all major corporate decisions and these decisions are formalised in a document known as a board resolution. In other words, a board resolution in our view is a formal document containing decisions made by the board of directors concerning the company. Therefore, by its very nature, the passing of the board resolution is exclusive to the directors and not outsiders or a third party.

10.19 We are therefore in agreement with the holding of the trial Judge, that the passing of the resolution is a mere matter of indoor or internal management and its absence, under certain circumstances cannot be used to defeat a bona fide claim.

We note, from the correspondence between the parties, that it is the Respondent, who insisted that the Appellant pass a board resolution appointing them before they could act on their instructions. In our view, the

insistence by the Respondent on the board resolution was merely due diligence on its part, to ensure that the directors had the authority to appoint the Respondent as advocates and avoid a situation such as the present.

10.20 However, that is as far as the Respondent could go without interfering in the internal regulations of the Appellant Company. Having accordingly advised the Appellant, it was not the duty of the Respondent firm to see to it that the Appellant Company carried out its own internal regulations or be expected to embark upon an investigation as to the legality, propriety and regularity of the acts of the directors.

10.21 The Respondent being an innocent stranger in the internal dealings and in the absence of any evidence to show that the Respondent had actual knowledge of the lack of authority or that there existed suspicious circumstances which ought to have put the Respondent on inquiry, the Respondent was entitled to proceed on the assumption of the existence of the resolution.

The transaction entered into by the Appellant under such circumstances cannot be defeated merely on the ground that no such resolution was in fact passed. The Appellant Company cannot rely on its own default to absolve it of its obligations and render the transaction invalid.

10.22 The proponents of the indoor management must have envisaged such circumstances and hence the protection of outsiders, such as the Respondent firm from the Company's actions or lack thereof.

10.23 Counsel for the Appellant also cited the case of **Ituna Partners v Zambia Open University**[4] in which the Supreme Court had this to say:

> *"The Appellant instituted an action on behalf of the Respondent without instructions from the Respondent. The Respondent suffered costs as a result of the Appellant's action. We find that it is illogical for any person at law, to suffer loss for an action which they did not authorize. This situation falls under the circumstances envisaged by Order 62/11/8 of the Rules of the Supreme Court, 1999. It*

would be extremely unfair and setting a bad precedent if Counsel, would, on his or her own volition commence legal proceedings in the name of a person without that person's instructions. An advocate can only institute legal proceedings on behalf of a person after obtaining instructions from that person."

10.24 That case in our view does not in any way assist Counsel in his argument, as in that case, the lawyers had commenced an action without instructions from the clients whilst in casu, the letter of 1st December, 2015 contained instructions from the Appellant to the Respondent and by their conduct after the letter from the Respondent, any reasonable person would believe that the Appellant was assenting to the retention of the Respondent. We see no bearing that the said case has over this matter.

10.25 We note that the Appellant has advanced the argument that the Appellant approached the Respondent firm on behalf of YJEL and that the correct party to settle the bill

is YJEL and not the Appellant Company. We find the argument by Counsel for the Appellant, self-defeating for the following reasons; firstly, the letter dated 1st December, 2015 appearing at page 61 of the record from the Appellant to the Respondent made it clear that the Appellant was appointing the Respondent firm to act on its behalf and not YJEL.

10.26 Furthermore, the deposit paid towards the legal fees was by the Appellant's agent and not that of YJEL. There was no evidence adduced to show that YJEL financed the payment of the deposit on legal fees.

In the case of **Indeco Estates Development Company Limited v Marshall Chambers,**[21] the Supreme Court stated as follows regarding the lawyer and client relationship:

> *"The instructing client is the one primarily liable to pay the lawyer's fees as the person who retained the lawyer's services."*

Based on the above authority, we, have no doubt and agree with the trial Judge that the conduct of the

Appellant lead to the inescapable inference that the Appellant Company retained the Respondent firm to act on its behalf. As rightly found by the trial Judge, there was no breach of **The Legal Practitioners Rules**[1] arising from the conduct of the Respondent Firm.

10.27 In view of the learned Judge's articulate evaluation of the evidence, we find no basis upon which to fault the findings of the learned Judge. It therefore follows that grounds two to five of the appeal are accordingly dismissed for lack of merit.

10.28 Coming to the order for ratification, in our view, the lower court having established that the directors of the Appellant Company bound the Company to the Respondent, It was sufficient for her to have found the Appellant liable and order the company to pay the sum due. We see no need for her to have gone further to make an order for ratification. In the view that we have taken, the Order for ratification is accordingly set aside.

11.0 CONCLUSION

11.1 In Conclusion, this appeal is devoid of merit and is accordingly dismissed with costs to the Respondent. Same are to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

C.K MAKUNGU
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE