IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 190/2013
SCZ/8/242/2013

BETWEEN

STAR DRILLING AND EXPLORATION LIMITED	**APPELLANT**
AND	
NATIONAL INSTITUTE FOR SCIENTIFIC AND INDUSTRIAL RESEARCH	**1ST RESPONDENT**
NATIONAL TECHNOLOGIES LIMITED	**2ND RESPONDENT**

Coram: Chibomba, Hamaundu and Kaoma, JJS.
On 9th July, 2014 and on 19th October, 2016

For the Appellant: Mr. N. Nchito, S.C. and Mrs. N. Simachela both of Nchito and Nchito Advocates.

For the 1st and 2nd Respondents: Mr. C. Syanondo of Malambo and Company.

JUDGMENT

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General vs. Marcus Achiume (1983) Z. R. 1.**
2. **Selly Yoat Asset Management Limited vs. Remotesite Solution Zambia Limited (2010) 2 Z. R. 35.**
3. **Collett vs. Van Zyl brothers Limited (1966) Z. R. 65.**
4. **YB and F Transport Limited vs. Supersonic Motors Limited (2000) Z. R. 22.**
5. **Rodwell Kasokopyo Musamba vs. M. M. Simpemba (T/A Electrical and Building Contractors) (1978) Z. R. 175.**
6. **Associated Chemicals Limited vs. Hill and Delamin Zambia and Ellis and Company (1998) Z. R. 9.**
7. **B.P. Zambia PLC vs. Interland and Motors Limited (2001) Z. R. 37.**
8. **Nkhata and Others vs. the Attorney General (1966) Z. R. 147.**
9. **R.F. Investments Limited vs. Citizens Economic Empowerment Commission (2010) Vol. 2 Z. R. 317.**
10. **Leon Norton vs. Nicholas Lostrom (2010) Vol. 1 Z. R. 359.**
11. **Rodgers Chama Ponda and others vs. Zambia State Insurance Corporation Ltd (2004) Z. R. 151.**

12. **Kelvin Hang'andu and Company (a Firm) vs. Webby Mulubisha (2008) Vol. 2 Z. R. 82.**

13. **Colgate Palmolive (Z) Limited vs. Able Shemu Appeal No. 11 of 2005**

14. **General Nursing Council of Zambia vs. Mbangweta (2008) Vol. 2 Z. R. 105.**

Other authorities referred to:

1. **Black's Law Dictionary (full citation not given).**
2. **Halsburys Laws of England, 3rd Edition.**
3. **Atkins Court Forms, 2nd Edition, Volume 37.**
4. **Oxford Dictionary of Law, 5th Edition, Oxford University Press, 2003.**

The Appellant who was the Defendant in the court below, appeals against the Judgment of the High Court which inter-alia, ordered the Appellant to remove its moveable equipment and machinery from the 1st Respondent's premises within six months from the date thereof and also granted possession of the premises known as the Industrial Plant to the 1st Respondent and awarded mesne profits to be assessed by the Deputy Registrar for the unauthorised occupation of the Industrial Plant from 16th August, 2010 up to Judgment date. The Court below also awarded interest on the mesne profits as shall be assessed from date of Writ to Judgment day at the Bank of Zambia short term deposit rate and thereafter, at current bank lending rate up to final settlement.

The Court below also awarded to the Appellant compensation/refund of the cost of construction of a shed to be assessed by the Deputy Registrar plus interest on the sum found due from the date of counterclaim to Judgment date at short term deposit

rate and thereafter at current bank lending rate till final payment. The learned Judge, however, dismissed with costs, the Appellant's counterclaim against the 3rd party on ground that the Appellant had failed to prove the claim to the required standard.

The history leading to this Appeal is that on 26th February, 2007 the Appellant and the 2nd Respondent entered into a Memorandum of Understanding (MOU) whose main purpose was to incorporate a joint venture company to produce and market clay and ceramic products and coal briquettes. However, before the joint venture company could be incorporated, the 2nd Respondent, by letter dated 18th January, 2010 terminated the MOU. Prior to the termination of the MOU, the 1st Respondent and the Appellant were engaged in various negotiations and communication concerning the formation of the joint venture company. During this period, the Appellant constructed a shed on the 1st Respondent's premises, known as the Industrial Plant and moved some of its equipment and machinery to that premises.

Following the termination of the MOU, the 1st Respondent ordered the Appellant to remove its equipment and machinery from the premises and correspondence concerning this was exchanged. Subsequently, the 1st Respondent informed the Appellant that if it did not remove its equipment from that premises, then the 1st Respondent would start charging storage fees. The Appellant did not however, remove its

equipment. As a result, the 1st Respondent commenced an action in the High Court against the Appellant in which the 1st Respondent sought an order directing the Appellant to remove its equipment from the premises; payment of storage charges from 16th August, 2010 to date of removal of the equipment at the rate of K500,000 per day; interest thereon; any other relief the Court would deem fit; and costs.

The Appellant filed a defence and a counterclaim in which liability was denied. In the counterclaim, the Appellant claimed costs of importing and bringing the machinery; utility bills paid; research and development charges; labour and related costs; damages for breach of contract and for misrepresentation.

The Appellant then issued third Party Proceedings against the 2nd Respondent claiming that it was entitled to be indemnified against the 1st Respondent's claim on ground that it was the 2nd Respondent which had the obligation under the MOU to secure a lease from the 1st Respondent. The 1st Respondent filed a defence to the counterclaim and the 2nd Respondent also filed a defence against the claim by the Appellant for indemnity and the matter proceeded to trial.

After hearing the evidence which the learned Judge considered and analysed together with the submissions by Counsel for the parties and as regards the 1st Respondent's claim against the Appellant, the learned trial Judge found and held that since the premises in question

belonged to the 1st Respondent, the Appellant should remove its equipment and vacate the premises within 6 months on ground that once the MOU was terminated, the Appellant became unauthorized to occupy the premises as it had occupied the premises without a licence, lease or permission of the owner.

As regards the claim for storage charges, the trial Judge declined to allow this claim on ground that "since the Appellant had been in occupation of the Industrial plant, storage charges did not apply". She however, awarded mesne profits to be assessed by the Deputy Registrar to the 1st Respondent on ground that "the position of the law is that where property is occupied without licence/lease agreement/permission, the owner of the premises is entitled to mesne profits, from the period of occupation."

As for the claim for damages for being deprived of the use of the premises in question, the learned trial Judge awarded interest on the mesne profits to be assessed effective from 16th August, 2010 to date of Judgment.

As regards the Appellant's counter-claim, the learned trial Judge found that the claims by the Appellant had not been proved to the required standard of balance of probabilities. And that the Appellant had not proved its counter-claim for damages for breach of Contract, improper and unwarranted termination of contract and consequential

loss claimed. And that since the 1st Respondent was not party to the MOU, it was not bound by that MOU as it was not privy to it.

In respect of the shed constructed by the Appellant, the learned Judge allowed this claim on ground that it would amount to unjust enrichment for the 1st Respondent to re-take the premises without compensating the Appellant for the shed. She referred the matter of quantum of damages to the Deputy Registrar for assessment.

On the claim for damages for misrepresentation as regards the MOU and the argument by the Appellant that in fact, the 1st and 2nd Respondents were inextricably intertwined and inseparable, the trial Judge ruled that the mere fact that the 1st Respondent is a shareholder in the 2nd Respondent Company which signed the MOU with the Appellant, did not amount to misrepresentation as the 1st and 2nd Respondents had distinct and separate legal personalities.

As regards the Appellant's claim against the 2nd Respondent as a 3rd party, the trial Judge found that the claim by the Appellant against the 2nd Respondent was a subject of arbitration and that the claim by the Appellant against the 2nd Respondent in this matter was the same as the claim under arbitration and that the arbitral tribunal had in fact, rendered a final award and found the 2nd Respondent liable and that the matter was pending assessment of damages for breach of contract. She,

therefore, dismissed the Appellant's claim against the 2nd Respondent in this respect.

Dissatisfied with the Judgment by the Court below, the Appellant appealed to the Supreme Court advancing four Grounds of Appeal in the Memorandum of Appeal as follows:-

1. **The Learned trial Judge erred in law and in fact when she dismissed the Appellant's counter-claim against the 1st Respondent notwithstanding the evidence on Record showing that the 1st Respondent and 2nd Respondent's interest in the project in issue was indistinguishable and that the prime-mover of the project was in fact the 1st Respondent.**

2. **The Learned trial Judge erred in law when she found that there was no misrepresentation as to the parties to the Memorandum of Understanding (MOU) when she had found as a fact that all the negotiations and communications relating to the MOU were between the Appellant and the 1st Respondent and the 2nd Respondent only signed the document.**

3. **The Learned trial Judge erred in law and in fact when she dismissed the Third Party proceedings between the Appellant and the 2nd Respondent on the ground that the claims in the Third party Notice were the same as the claims in the arbitration proceedings between the Appellant and the 2nd Respondent when in fact not.**

4. **The Learned trial Judge erred in law and in fact when she awarded costs to the 1st Respondent when the Appellant had succeeded in part of its counter-claim and the 1st Respondent had not succeeded in some of its claims.**

In support of this Appeal, Counsel for the Appellant, Mr. Nchito, SC., relied on the Appellant's Heads of Argument filed. He began by restating the background leading to this Appeal. We shall not repeat this as we have already referred to it above.

As regards Ground 1 which attacks the learned trial Judge for dismissing the Appellant's counterclaim against the 1st Respondent notwithstanding the evidence on record showing that the 1st and 2nd Respondents' interest in the project in issue was indistinguishable and that the prime mover of the project was in fact the 1st Respondent, Mr. Nchito, SC., began by referring us to the finding by the court below where the Judge put it as follows: -

> **"I therefore, find that the Defendant has failed to prove its counterclaim in respect of the claim for damages for breach of agreement, improper and unwarranted termination and consequential loss thereon."**
>
> **"In respect of the counterclaim by the Defendant against the Plaintiff as tabulated in the particulars of damage as a result of the alleged breach of contract, I am of the considered view that the Defendant has failed to prove on the balance of probabilities that it is entitled to the said claims save for one claim which I will come back to namely the claim in respect of the shed. As earlier held there was no contract between the Plaintiff and the Defendant. The MOU was between the Third Party and the Defendant."**

It was State Counsel Mr. Nchito's further submission that the court below erred when it found that the Appellant's claim against the 1st Respondent for breach of contract failed because there was no agreement between the Appellant and the 1st Respondent. He submitted that this was despite the fact that there was ample evidence on record that the 1st and 2nd Respondents' interest in the project was indistinguishable. In support of the above argument, Mr. Nchito, S.C. cited the case of **Attorney General vs. Marcus Achiume**[1]. In that case, we made it clear that the appellate court will not reverse findings of fact

made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make. He submitted that in the case in casu, the finding by the trial Judge that there was no agreement between the Appellant and the 1st Respondent is not supported by the evidence on record as the evidence on record shows that all the negotiations leading to the MOU were between the Appellant and the 1st Respondent. In this regard, State Counsel referred to the correspondence exchanged between the Appellant and the 1st Respondent which is at pages 353 to 362 of the Record of Appeal. State Counsel, therefore, submitted that these show that there were never any negotiations or communications between the Appellant and the 2nd Respondent. And that the trial court accepted this fact. Therefore, Mr. Nchito's argument was that the court below, having found as a fact that the 2nd Respondent only signed the MOU, should have come to the finding that the agreement was between the Appellant and the 1st Respondent. This was the basis upon which the Appellant argued that had the court below properly evaluated the evidence before it, it would have found that the agreement was between the Appellant and the 1st Respondent and that the 1st Respondent was the prime

mover of the project and not the 2nd Respondent who merely signed the agreement.

As to what a 'prime mover' is, State Counsel referred to **Black's Law Dictionary** (full citation not given) where this term is defined as: -

> **"A person or establishment that is chiefly responsible for the creation or execution of a plan or project."**

State Counsel submitted that it is clear from the record that the entity that was responsible for the creation and execution of the MOU was the 1st Respondent. Hence, the learned Judge clearly fell into error when she failed to evaluate the evidence resulting into her finding that the 1st Respondent was not liable because it did not sign the MOU. In furthering this contention, State Counsel drew our attention to the letter at page 394 of the Record of Appeal which was written after the Memorandum of Understanding was signed. He argued that this letter shows that the 1st Respondent was indeed the prime mover of the project which the 1st Respondent admits as the entity that had entered into a partnership with the Appellant and that the MOU was signed between them. Therefore, the court below should have considered this evidence and found that indeed, the 1st Respondent was the prime mover of the project and therefore, its interest in the project was indistinguishable from that of the 2nd Respondent and that the 1st

Respondent was in this vein liable for breach of agreement as pleaded by the Appellant in the court below.

It was Mr. Nchito, S.C.'s further contention that the finding by the court below that the counterclaim against the 1st Respondent failed should be overturned because although there was ample evidence on record that showed that the 2nd Respondent signed the agreement, the prime mover of the project was the 1st Respondent and that it is the 1st Respondent that was liable for damages for breach of agreement, improper and unwarranted termination and consequential loss thereon. Therefore, that Ground 1 of this Appeal should be allowed.

In support of Ground 2 which attacks the learned Judge for finding that there was no misrepresentation as to the parties to the MOU despite finding as a fact that all the negotiations and communications relating to the MOU were between the Appellant and the 1st Respondent and that the 2nd Respondent only signed the document, Mr. Nchito, SC, referred to the finding by the learned Judge that from the particulars of alleged misrepresentation, her view was that there was no such misrepresentation as the mere fact that there were negotiations between the Appellant and the 1st Respondent prior to the execution of the MOU between the Appellant and the 3rd party were not themselves circumstances for a presumption that the MOU was a result of misrepresentation.

Mr. Nchito submitted that the Appellant disagrees with this finding by the court below as the conduct of the 1st Respondent shows that the execution of the MOU by the Appellant was indeed procured by way of misrepresentation. And that in his evidence in Chief, DW2 clearly explained what happened.

State Counsel Nchito, pointed out that this evidence was unchallenged under cross-examination. And that the 1st Respondent did not even lead any evidence to rebut the evidence of DW2. Hence, his argument that for the 1st Respondent to bring in the 2nd Respondent only at the point when the MOU was being signed, was a misrepresentation on the 1st Respondent's part. As authority, State Counsel referred to **Halsbury's Law of England,** 3rd edition at page 837 where misrepresentation is defined as follows: -

> **"A representation is deemed to have been false if it was at the material date false in substance and in fact."**

It was argued that the 1st Respondent's action of negotiating and agreeing with the Appellant all the terms of the MOU and then substituting itself with the 2nd Respondent at the signing ceremony is a misrepresentation and hence, the Appellant is entitled to damages. State Counsel again referred to page 830 of **Halsbury's Laws of England** where it is stated that: -

"In the first place only he who actually made the representation is liable for its consequences."

It was submitted that the 2nd Respondent was never a party to the negotiations and that no agreement was reached between the Appellant and the 2nd Respondent. And that from 2005, when the negotiations began to 2007 when the MOU was finally signed, the 1st Respondent made the Appellant believe that it was the entity working with the 1st Respondent. And that the 2nd Respondent was not mentioned until the MOU was about to be signed and that DW2's evidence to this effect was unchallenged. Since a false representation was made by the 1st Respondent at the signing of the MOU, the 1st Respondent is liable for the misrepresentation and that the learned Judge therefore erred in law when she found that the fact that material negotiations were only between the Appellant and the 1st Respondent and that the 2nd Respondent only signed the MOU was not sufficient evidence of the misrepresentation as by so holding, the trial court failed to consider that the Appellant had already adjusted his position in reliance on the conduct of the 1st Respondent during negotiations. And that the Appellant moved the necessary equipment onto the premises and made a huge investment into the agreed activities. In support of the above submissions, State Counsel, referred to page 855 of **Halsbury Laws of England,** 3rd edition where the learned authors stated as follows: -

"A representee may act on the faith of a representation so as to alter his position in various ways. He may enter into a contract with the representor himself or with a third person or class of persons."

He further submitted that the evidence of RW2 clearly shows that the only reason he signed the MOU with the 2nd Respondent as a third Party to the negotiations was that he was assured by the 1st Respondent that all would proceed in accordance with the plan despite the change in signatory. And that the Appellant's contention is that it was entitled to damages for the misrepresentation because the action of the 1st Respondent had a bearing on the Appellant's material interest and has caused it loss.

In response to the case of **Selly Yoat Asset Management Limited vs. Remotesite Solution Zambia Limited**[2] cited in which it was stated that all agreements entered into freely and voluntarily will be enforced by the courts, Mr. Nchito, S.C., submitted that the Appellant did not enter into the MOU freely and voluntarily as the 1st Respondent had made a misrepresentation as to whom the Appellant was contracting with by introducing a third Party when the document was being signed. And that the learned trial Judge failed to consider the fact that the 1st Respondent did not show at trial that the Appellant was not and could not have been deceived in the circumstances.

Mr. Nchito, S.C., referred to **Chitty on Contracts, Volume 1, General Principles**, 29th edition at page 447 where the learned authors

stated that the burden of proving that the claimant had actual knowledge of the truth and therefore, was not deceived by the misrepresentation lies on the Defendant.

It was argued that since the 1st Respondent did not discharge its burden of proof in the court below, the Appellant was entitled to an award of damages for misrepresentation as pleaded. He, accordingly, urged us to set aside the finding of the court below and allow the second Ground of Appeal.

In support of Ground 3 which attacks the learned Judge for dismissing the third Party proceedings between the Appellant and the 2nd Respondent on ground that the claim in the third Party Notice was the same as the claim in the arbitration proceedings between the Appellant and the 2nd Respondent when in fact not, Mr. Nchito, S.C., submitted that the learned Judge stated that: -

> **"For the foregoing reasons, the counterclaims against the Third Party by the Defendant are hereby dismissed. The issue of liability having been decided is final and binding. The Court cannot decide on the same claims that were subject of arbitration. The Defendant is directed to go back before the arbitrator for assessment of damages."**

Based on the above, State Counsel Nchito, argued that the above finding is a misapprehension of the facts and that it cannot be sustained. He also referred us to paragraph 10 of the arbitral award. Mr. Nchito, S.C., submitted that the Appellant's claim at arbitration was for damages

for breach of agreement, improper and unwarranted termination and consequential losses thereon. However, that in the third Party Proceedings in the court below, the Appellant was seeking indemnity from the 2nd Respondent against the 1st Respondent. He pointed out that as per **Atkins Court Forms, 2nd edition, volume 37 at page 341**, the important factor is that the third party claim should determine who should ultimately bear the loss suffered by the plaintiff.

Mr. Nchito, S.C., submitted that the third Party Proceedings must be construed in the light of the 1st Respondent claim against the Appellant which was for possession of the premises, damages and payment of storage charges for the use and occupation of the land. And that the Appellant sought indemnity against these claims on ground that according to the MOU, the obligation to secure a lease for the premises lay on the 2nd Respondent which did not do so. He argued that the court below therefore fell into a grave error when it determined that the claims at arbitration were the same as the claims in the third Party Notice because the Appellant was not seeking damages for breach of agreement in the third Party Proceedings but seeking to be indemnified against the 1st Respondent's claim against it. And that if the 1st Respondent's claim against the Appellant were successful, the court below would have resolved the question as to whether the Appellant was entitled to indemnity on grounds stated in the third Party Notice. Hence,

his argument that the finding of the court below that the third Party *Notice* was the same as the Appellant's claim at arbitration was wrong on the facts and on the law and that it should be set aside and Ground 3 of this Appeal should be allowed.

As regards Ground 4 which challenges the learned Judge for awarding costs to the 1st Respondent when the Appellant had succeeded in part of its counterclaim and the 1st Respondent had not succeeded in some of its claims, reference was made to what the court below found as regards the issue. This is as follows: -

> **"The Defendant's counterclaims against the Plaintiff in respect of the claim for compensation/refund of the costs of construction of the shed (30 by 20 metres) constructed on the Plaintiff's premises succeeds. It is hereby adjudged that the Plaintiff do pay the defendant the value of the costs incurred for construction of the said shed."**
>
> **"Costs are awarded to the Plaintiff and the Third Party to be taxed in default of agreement."**

It was State Counsel's position that since the Appellant was successful in its claim against the 1st Respondent whilst the other claims did not succeed, equally, the 1st Respondent succeeded in some of its claims whilst others were unsuccessful, this being the case, then the court below should not have condemned the Appellant to costs for both the Appellant and the 2nd Respondent. State Counsel pointed out that although the Appellant was alive to the fact that costs are in the discretion of the court, however, that this discretion must be exercised

judiciously. State Counsel cited the case of **Collett vs. Van Zyl brothers Limited**[3] which states that: -

> **"A trial Judge, in exercise of his discretion, should, as a matter of principle, view the litigation as a whole and see what the substantial result was. Where he does not do so, the Court of Appeal is entitled to review the exercise of this discretion."**

He pointed out that since both the Appellant and the 1st Respondent were successful in some claims, the court below should have ordered each party to bear its own costs as the substantial result was that each party had partly succeeded. He pointed out that this was the reasoning of this Court in **YB and F Transport Limited vs. Supersonic Motors Limited**[4] where it is stated as follows: -

> **"The question should have been "who has won the case?" If the court considered that the award of limited interest to the defendant meant the defendant had "substantially" won his counterclaim, then a better result would have been to declare that each side had substantially won their cases and to have ordered each party to bear its own costs."**

Mr. Nchito, SC, submitted that this position was confirmed in the case of **Rodwell Kasokopyo Musamba vs. M. M. Simpemba (T/A Electrical and Building Contractors)**[5] where the Court put it thus: -

> **"The ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay costs of the other side, unless he has been guilty of some sort of misconduct."**

He pointed out that in the case in casu, there was no misconduct on the part of the Appellant in the court below and that the trial Judge did

not point to any. And therefore, there was no reason at law to make the Appellant bear the costs of the 1st Respondent given the circumstances. And that this Ground of Appeal should therefore, be allowed and the award of costs to the 1st Respondent in the court below be set aside.

In summing up, State Counsel Nchito took the view that on the totality of the above arguments and submissions, all the four Grounds of Appeal should be allowed with costs to the Appellant.

The learned Counsel for the Respondent, Mr. Syanondo, also relied on the Respondent's Heads of Argument filed. He began his submissions by restating the facts leading to this Appeal.

In response to the arguments relating to Ground 1 of Appeal and in particular, the argument that the 1st and 2nd Respondents' interest in the project were indistinguishable, Mr. Syanondo submitted that this argument cannot be sustained because the 1st Respondent being a shareholder in the 2nd Respondent does not make its interest indistinguishable as there is a distinction between a company and its shareholders and that this position is settled in our jurisdiction. Counsel referred us to the case of **Associated Chemicals Limited vs. Hill and Delamin Zambia and Ellis and Company**[6] in which Counsel submitted that this Court stressed the legal separation of a Company and its shareholders.

Counsel submitted that the above case was also applied with approval in the case of **B.P. Zambia PLC vs. Interland and Motors Limited**[7] where this Court put it thus: -

> **"The point was well taken that a company can only act through its human agents when counsel cited our remarks to this effect in Associated Chemicals Limited v. Hill and Delamin Zambia Limited and Another (2). As a metaphysical entity or fiction of law which only has legal but not physical existence, a company (though being a separate and distinct legal person from its members or shareholders) can only act through the humans charged with its management and the conduct of its affairs."**

It was Counsel's submission that the Appellant's argument of having indistinguishable interest between the 1st and 2nd Respondents cannot stand. And that the court below found as a fact that the 1st and 2nd Respondents were distinct entities in the Ruling which was not appealed against. It was further argued that the court below found that the evidence of the witnesses showed that the MOU was between the Appellant and the 2nd Respondent. Counsel referred us to the Record of Appeal where it is stated that: -

> **"Question: Is there any MOU between NISIR and the Defendant Star Drilling?**
>
> **Answer: No my Lady.**
>
> **Question: Now you would agree with me that the only MOU that exists is between NTL and Star Drilling?**
>
> **Answer: I agree."**

The case of **Nkhata and Others vs. The Attorney General**[8] was also cited as to when an appellate Court may reverse findings of fact of the trial court.

Counsel argued that in the current case, the Appellant did not meet the conditions for reversal of findings of fact. And that the findings of fact were based on evidence before the court below. Counsel argued that the Court will note from the letters that preceded the signing of the MOU that the MOU superseded all prior statements and understandings between the parties to the MOU and the 1st Respondent. Since the negotiations between the Appellant and the 1st Respondent did not yield any agreement as the agreement was instead, entered into between the Appellant and the 2nd Respondent, the 1st Respondent was therefore not a party to the MOU. Hence, that the choice of the Appellant to enter into an agreement with the 2nd Respondent is one which this court should uphold.

In support of the above submission, Counsel cited the case of **R. F. Investments Limited vs. Citizens Economic Empowerment Commission**[9], a High Court decision.

It was pointed out that at the time the Appellant entered into the MOU with the 2nd Respondent, the Appellant knew which party it was dealing with to the extent that it was agreed that the 2nd Respondent

would lease the 1st Respondent's property. And that this knowledge can also be seen from the suit which was taken against the 2nd Respondent. It was also agreed in the MOU that the 1st Respondent ought to be indemnified in terms of costs regarding any suit. And that what the Appellant seeks to do is to renege from the contract which it negotiated with the 2nd Respondent and that this cannot happen. That the above argument is fortified by this Court's decision in **Leon Norton vs. Nicholas Lostrom**[10] where we put it thus: -

> **"Coming to the substantive argument raised by the Appellant, it is trite law that a party to a contract is bound by it even though it may not have been in the interest of that party entering into that contact. See the case of Chwee King Keong vs. Digil and Mall. Com Pre Limited. Even a bad contract, if it is valid, is binding."**

Counsel argued that the letter at page 394 and the evidence on record are to the effect that there was no MOU with the 1st Respondent as the only MOU is the one between the Appellant and the 2nd Respondent. Hence, Ground 1 of the Appeal is devoid of merit and should be dismissed.

In response to Ground 2 of this Appeal, Counsel submitted that the sanctity of the parties' liberty to frame the terms of their contract is what the courts preserve. And that the court cannot read into the contract so as to vary or add to its terms as was held in **Selly Yoat Asset**

Management Limited vs. Remotesite Solutions Zambia Limited[2] where it was put thus: -

> **"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."**

It was argued that the above principle was confirmed by this Court in **Rodgers Chama Ponda and others vs. Zambia State Insurance Corporation Ltd**[11] in which we guided that: -

> **"Parole evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly concluded by the parties."**

It was contended that the terms of the MOU are clear. And that the issue which concerned the 1st Respondent was to do with leasing of the leasehold properties and machineries by the 2nd Respondent. And that now to try to state that the 1st Respondent was party to the MOU would be adding to the contract which the law forbids. And that the negotiations between the Appellant and the 1st Respondent did not culminate into any agreement and that the understanding that the Appellant was dealing with the 2nd Respondent can be seen from the letter from the Appellant at page 396 to 398 of the Record of Appeal. That this letter also discloses that the Appellant was not to operate on the premises. It was further pointed out that the entity which was to operate the joint venture was not registered and that the Appellant was

not an entity to carry out the spirit of the intended joint venture. Therefore, that the parties went into the MOU with their eyes wide open and no misrepresentations were made. And that the requirement in the MOU of leasing of the properties by the 2nd Respondent from the 1st Respondent, does not indicate that the 1st Respondent was to be a party and hence, Ground 2 of Appeal should be dismissed.

In response to the arguments relating to Ground 3 of the Appeal as to whether or not the claims in the third Party Notice were the same as the claims in the arbitration proceedings between the Appellant and the 2nd Respondent, it was argued that this Court will certainly see that there was abuse of the court process by the Appellant. It was submitted that the claim for which the Appellant wants to be paid by the 2nd Respondent is the same as the one over which it obtained an arbitration award and that this is the same claim that was being sought in the third Party Notice. Therefore, that the claim by the Appellant against the 2nd Respondent in this matter fell within the boundaries which this Court frowned upon in the case of **Kelvin Hang'andu and Company (a Firm) vs. Webby Mulubisha**[12] in which we put it thus: -

> **"Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable.**
>
> **The plaintiff was guilty of abuse of court process and forum shopping. The conduct of the plaintiff was condemned and disapproved of.**

The courts disapprove of parties commencing procedures, proceedings and actions over the same subject."

Counsel pointed out that what the Appellant was seeking was to benefit from the award rendered in arbitration and after having the fruits of the award, the Appellant would also like to be awarded in the proceedings before this Court. This would mean being paid twice and would certainly border on unjust enrichment which this Court has in numerous authorities discouraged. Therefore, Ground 3 of this Appeal should be dismissed.

In response to Ground 4 which criticises the court below for awarding costs to the 1st Respondent when the Appellant had succeeded in part of its counterclaim against the 1st Respondent, it was submitted that the appeal against the award of costs was only in regard to the award of costs to the 1st Respondent and not the 2nd Respondent. That the law is very clear as regards costs. Counsel cited the case of **YB and F Limited vs. Supersonic Motors Limited**[4] where we guided on awarding of costs.

Counsel pointed out that it is clear from the above authorities that the discretion to consider whether a party is substantially successful resides with the court. Hence, the award of the costs for constructing the shed was considered by the court below and the court felt that the

claim had succeeded and awarded the costs for constructing the shed to the Appellant. And that in short, the award of the costs of construction of the shed was a nominal one and as such, the Appellant was not successful. Counsel cited the case of **Rodwell Kasokopyo Musamba vs. M. M. Simpemba (T/A Electrical and Building Contractors**[5], where it was held that: -

> **"A plaintiff who recovers nominal damages is not necessarily successful."**

That on the basis of the above authorities, the Appellant cannot now resist the payment of costs.

In summing up, Counsel submitted that the Appellant's Appeal is devoid of merit. He therefore, urged us to dismiss it with costs.

We have seriously considered this Appeal together with the Grounds of Appeal advanced and the arguments in the respective Heads of Argument as well as the authorities cited therein. We have also considered the Judgment by the learned Judge in the court below.

Ground 1 of this Appeal raises the question whether or not the 1st and 2nd Respondents' interest in the project was intertwined and thus indistinguishable. This stems from the holding of the court below that the 1st and 2nd Respondents had distinct legal personality despite the 1st Respondent being a shareholder in the 2nd Respondent Company. The

thrust of Mr. Nchito's arguments in support of this Ground was that the court below erred as there was ample evidence on record which showed that the 1st and 2nd Respondents' interest in the project was indistinguishable, firstly, because all the negotiations leading to the MOU were between the Appellant and the 1st Respondent and secondly, the 1st Respondent was the prime mover of the project as the 2nd Respondent merely signed the MOU. Therefore, that had the court below properly evaluated the evidence before it, it would have found that there was an agreement between the Appellant and the 1st Respondent.

The gist of Mr. Syanondo's arguments in response was that the assertion that the 1st and 2nd Respondents' interest in the project was indistinguishable cannot be sustained because, although the 1st Respondent is a shareholder in the 2nd Respondent Company, it is a settled principle of law in our jurisdiction that there is a distinction between a company and its shareholders; and that the evidence on record shows that the MOU was between the Appellant and the 2nd Respondent; and that at the time the MOU was entered into, the Appellant knew the party it was dealing with to be the 2nd Respondent.

We have considered the above arguments. From the outset, we wish to point out that to a certain extent, Ground 1 challenges findings of fact made by the trial Judge. It is settled that an appellate court will not reverse findings of fact made by a trial court unless it is satisfied that the

findings in question are either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make. This position is fortified by a plethora of our earlier decisions including the case of **Attorney General vs. Marcus Achiume**.[1]

In the current case, the evidence on record shows that the MOU in question was signed between the Appellant and the 2nd Respondent. Under cross-examination, the Appellant's witness, DW1, stated that there was no MOU between the Appellant and the 1st Respondent as the only MOU that existed was between the Appellant and the 2nd Respondent. This position is also confirmed by the evidence of DW2 who stated that the MOU was between the Appellant and the 2nd Respondent.

Further, the record also shows that it is not in dispute that the joint venture company which was envisaged by the MOU that was signed between the Appellant and the 2nd Respondent did not materialize. Furthermore, the lease agreement which the 2nd Respondent was supposed to have secured from the 1st Respondent for use by the joint venture company to be formed was never put in place. This is confirmed by the evidence of both DW1 and DW2 which is on record.

We, therefore, do not agree with the submission by State Counsel Nchito that the court below should have found the 1st Respondent liable for damages for breach of agreement, improper and unwarranted termination and consequential loss thereon, as the evidence on record does not show that the 1st Respondent was party to the MOU in question and upon which we could have imputed liability on the 1st Respondent. We so opine because under the doctrine of privity of contract, only the parties to a contract can sue or be sued under the contract. Third parties cannot derive rights from or have obligations imposed on them by someone else's contract. Therefore, Mr. Nchito's argument that the court below should have found the 1st Respondent liable for breach of the MOU and for consequential loss resulting from the termination of the MOU flies directly in the teeth of this elementary principle of the law of contract.

For the reasons given above, we cannot fault the finding by the trial Judge that there was no agreement between the Appellant and the 1st Respondent as the finding is supported by the evidence on record. The learned Judge also properly analysed the evidence before her. Therefore, there is no basis upon which we as the appellate court can interfere with the findings of fact by the trial Judge.

As regards the question whether the 1st and 2nd Respondents' interest in the project in issue was indistinguishable, we wish to state

from the outset that it is a settled principle of law in our jurisdiction that there is a distinction between a company and its shareholders. We have taken this position in a plethora of cases where we underscored this legal principle on separation between a company and its shareholders. These include the case of **Associated Chemicals Limited vs. Hill and Delamin Zambia and Ellis and Company**[6] where we put it thus:-

> **"A principle of the law which is now too entrenched to require elaboration is the corporate existence of a company as a distinct legal person: See Salomon v Salomon and Company (1897) A.C. 22 and also the Companies Act, Cap. 388 of the 1995 Edition of the Laws of Zambia. Upon the issue of the certificate of incorporation, the company becomes a body corporate. As the learned authors of Palmer's Company Law (22nd Ed.) suggest in chapter 18, a Company is:**
>
> **"..... not, like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law it is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, with legal but no physical existence."**

In the current case, it is clear from the evidence on record that at law, the 1st and the 2nd Respondents are not one and the same. The two companies have separate legal personalities despite the 1st Respondent being a major shareholder in the 2nd Respondent Company. Therefore, the argument by State Counsel that the two companies' interest in the project was indistinguishable also flies directly in the teeth of the above cited authorities. At law, the two companies are not one and the same and any argument to the contrary is flawed.

Therefore, there is no basis upon which we can hold that the 1st and 2nd Respondents' interest in the project in question was indistinguishable. By so holding, we have not lost sight of the fact that the main purpose of the MOU between the Appellant and the 2nd Respondent was to incorporate a joint venture company to be involved in the production and marketing of clay and ceramic products and coal briquettes. Under the terms of the MOU, the 2nd Respondent was to lease land, buildings and machinery from the 1st Respondent for use by the joint venture company to be incorporated by the Appellant and the 2nd Respondent. This joint venture company was never incorporated. The Appellant, however, moved its equipment and constructed a shed on the 1st Respondent's property in anticipation that a joint venture company could be incorporated. This was before the 2nd Respondent obtained a lease from the 1st Respondent which owned the premises where the joint venture once incorporated, was to operate from. It is clear from these factors that liability for breach or termination of the MOU cannot be imputed to the 1st Respondent which was not party to the MOU. Therefore, we are not satisfied by the Appellant's assertion that the 1st and 2nd Respondents' interest in the project was indistinguishable as at the time the Appellant signed the MOU, it knew who it was signing the MOU with and that the 2nd Respondent was a separate and distinct company from the 1st Respondent company.

For the reasons given above, we find no merit in Ground 1 and we dismiss it.

The thrust of Mr. Nchito's argument in support of Ground 2 was that the action by the 1st Respondent of negotiating and agreeing with the Appellant all the terms of the MOU and then substituting itself with the 2nd Respondent at the point when the MOU was being signed is a misrepresentation. To support this argument, Mr. Nchito referred us to the evidence of DW2 which he contended, shows this misrepresentation.

The kernel of Mr. Syanondo's arguments in response was that it is clear from the letter from the Appellant at page 396 to 398 of the Record of Appeal that negotiations between the Appellant and the 1st Respondent did not culminate into any agreement. And that there was an understanding that the Appellant was dealing with the 2nd Respondent. Therefore, no misrepresentations were made as the parties entered into the MOU with their eyes wide open.

We have considered the above arguments. The learned authors of **Oxford Dictionary of Law, 5th edition** have defined the term "Misrepresentation" as follows:-

> **"Misrepresentation- An untrue statement of fact, made by one party to the other in the course of negotiating a contract, that induces the other party to enter into the contract."**

In his evidence, DW2 put it thus:-

"On 25th February, 2007, the Memorandum of Understanding was finally concluded by me as the representative of the Defendant and the Executive Director of NISIR. Also present were NISIR Board Members and a representative from the Ministry of Science and Technology.

The initial signing ceremony was postponed to allow the change where a company called National Technologies Limited was to sign the MOU instead of NISIR. I have never dealt with NTL before. I had at all material times dealt with NISIR on this transaction. This is clear from the communication that I have alluded to above. I was advised that NTL only existed on paper and it did not even have a Board of Directors. I was assured by NISIR management that all was well even though they had placed NTL as the contracting party because this was a company wholly owned by NISIR."

From the evidence of DW2 recast above, it is clear that at the time of signing the MOU, the Appellant knew the party that it was signing the MOU with and that this was the 2nd Respondent and not the 1st Respondent. This is so because the evidence on record shows that the initial signing ceremony was postponed to allow for the change of parties to substitute the 1st Respondent with the 2nd Respondent.

Further, the letter from the Appellant to the 2nd Respondent which is recast below, clearly shows that the Appellant was aware and knew the party it had entered into the MOU with and whom it was dealing with. The relevant parts of the letter read as follows:-

"31st July, 2009

The Chief Executive Officer
National Technologies Limited
C/O National Institute for Scientific Research
Airport Road
LUSAKA.

Attn: Mwananyanda M. Lewanika, PhD

JOINT VENTURE COMPANY –NTL AND SDEL

Your response of 20th July 2009 to our letter of 26th June on the above subject refers.

We acknowledge and appreciate your board resolutions of 17th July 2009 and in response advise as follows:

We are alive to the various apparent misunderstandings between management of Star Drilling and Exploration Limited (SDEL) and National Technologies Limited (NTL) in the informal operation of the special purpose vehicle joint venture company- NISTAR. We are of the opinion the misunderstandings and apparent contentious issues could have resolved with dialogue between SDEL and NTL to amicably pursue the way forward for NISTAR. It is, however, with regret that we have come this far in the joint company with speculation prevailing trust and goodwill in achieving the objective of our joint venture company.

Our position on the various issues you raised in your letter of 20th July 2009 is as follows:

a) REGISTRATION OF NISTAR

We have attempted to register NISTAR formally with the PATENTS and Companies Registration Office (PACRO) and the Registrar of Companies in Zambia in accordance with our earlier mandate as provided for in our original MOU.

Our failure to agree terms for the "Articles of Association" as articulated in the original MOU has been the major stumbling block.

We have not had the good will of the board of NTL to proceed and articulate the provisions of the original MOU as follows:

- That NTL provided the needed technologies to NISTAR for development to commercial levels;
- NISTAR has access to the Chalimbana clays as raw material input without hindrance ; and
- NISTAR accesses the facilities of the NTL porcelain and ceramic plant.

In our view, these should have been articulated in the Articles of Association to enable register NISTAR as legal entity with limited liabilities on the shareholders.

On our part we have proceeded to implement our part of the MOU by providing the needed plant and machinery, provision of the needed working capital and recruitment training of requisite personnel required to operate NISTAR...

Yours faithfully,
For/Star Drilling and Exploration Limited

Nasri Saffiddiene
Managing Director."

Therefore, the Appellant cannot successfully argue that it did not know that it was the 2nd Respondent and not the 1st Respondent that it was to sign the MOU with. Neither can the Appellant be heard to claim that it was induced to sign the MOU with the 2nd Respondent by any falsehood on the part of the 1st Respondent. If the Appellant had any objection to the substitution of the 1st Respondent with the 2nd Respondent, it should have objected to that act at that point. The Appellant must have also known that the 1st Respondent was a separate entity from the 2nd Respondent. Therefore, the argument that the execution of the MOU was procured by misrepresentation cannot stand. We thus agree with the learned Judge that the Appellant's evidence did not meet the threshold of proving to the required standard that there was misrepresentation of the facts by the 1st Respondent during the course of the negotiations which could have induced the Appellant to sign the MOU with the 2nd Respondent whilst believing that it was contracting with the 1st Respondent. In the case of **Colgate Palmolive (Z) INC vs.**

Able Shemu[13], we emphasised the Court's approach relating to this type of disputes. We stated that:-

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

In the current case, the Appellant has not shown that it did not freely and voluntarily enter into the MOU with the 2nd Respondent or that it was induced to sign the MOU with the 2nd Respondent by the 1st Respondent. For the reasons stated above, Ground 2 has no merit and we dismiss it.

Ground 3 takes issue with the learned Judge for dismissing the Third Party Proceedings between the Appellant and the 2nd Respondent. The reason given is that the claim in the Third Party Notice was the same as the claim in the arbitration proceedings between the Appellant and the 2nd Respondent when in fact not. The gist of State Counsel Nchito's submissions in support of this Ground was that the finding by the court below was flawed as the Appellant's claim at arbitration was for damages for breach of agreement, improper and unwarranted termination and consequential losses thereon while in the Third Party Proceedings, the Appellant was seeking indemnity from the 2nd Respondent against the reliefs sought by the 1st Respondent from the Appellant in the court below. Hence, the two claims were different.

The gist of Mr. Syanondo's arguments in response was that the claim for which the Appellant sought to be indemnified by the 2nd Respondent in the Third Party Notice is the same as the claim over which it obtained an arbitration award.

We have considered the above arguments. Perusal of the record has revealed that although the Third Party Notice which the Appellant issued against the 2nd Respondent in the court below is listed in the index of the Record of Appeal, a copy of the actual Notice was not included in the record. However, according to the Affidavit in Support of the Summons for leave to issue a Third Party Notice, the Appellant sought to be indemnified by the 2nd Respondent against the 1st Respondent's claims in the court below concerning the removal of the Appellant's equipment from the 1st Respondent's premises. The 1st Respondent also sought damages and storage charges following the termination of the MOU by the 2nd Respondent. This was on ground that it was the 2nd Respondent that had the obligation under the MOU, to secure a lease for the occupation of the 1st Respondent's premises by the joint venture company that was to be formed.

The final award by the arbitral tribunal between the Appellant and the 2nd Respondent shows that the Appellant's claim before the tribunal against the 2nd Respondent was for the following reliefs:-

"II. The claim

10. The claimant's claim as set out in its Statement of Claim is for damages for breach of agreement, improper and unwarranted termination and consequential loss (es) thereof."

We note that the above claim is the same claim, word for word, as the Appellant's claim in its counterclaim against the 1st Respondent in the court below.

The arbitral award on record also shows that the tribunal found in favour of the Appellant and held that the 2nd Respondent was liable to pay damages to the Appellant for breach of contract. The tribunal also reserved to a separate hearing, the assessment of the damages to be awarded to the Appellant as in its claim, the Appellant had not quantified the damages. In paragraph 10 of the Appellant's Affidavit in Support of Summons for leave to issue a Third Party Notice on record, the Appellant confirmed the decision of the arbitral tribunal which found that the 2nd Respondent had wrongly terminated the MOU thereby occasioning loss to the Appellant.

From the above, our firm view is that the question of the 2nd Respondent's liability to the Appellant resulting from the termination of the MOU and any consequential loss suffered by the Appellant was addressed and decided by the arbitral tribunal. What remains is the quantification or assessment of the actual damages due to the Appellant. Therefore, since under the Third Party Proceedings, the Appellant sought indemnification from the 1st Respondent arising from

the 2nd Respondent's alleged breach of the MOU, the effect of allowing the Appellant's claims in the Third Party Proceedings would have amounted into the Appellant being paid twice by the 2nd Respondent for breach of the MOU as the 2nd Respondent had already been found liable to pay damages to the Appellant for breach of the MOU by the arbitral tribunal.

For the reasons given above, we cannot fault the decision by the trial Judge of dismissing the Appellant's Third Party Proceedings as her decision is supported by the evidence and the reasons given for the decision.

In support of Ground 4 which attacks the learned Judge for awarding costs to the 1st Respondent despite the Appellant's counterclaim succeeding in part and the 1st Respondent not succeeding in some of its claims, the core of Mr. Nchito's arguments is that since both the Appellant and the 1st Respondent were successful in some of their respective claims and unsuccessful in others, the substantial result is that each party partly succeeded. Hence, the court below should have ordered each party to bear its own costs as there was no basis for making the Appellant to bear the 1st Respondent's costs.

In response, the kernel of Mr. Syanondo's arguments was that the Appellant cannot resist the payment of costs as the court has discretion to consider whether or not a party is substantially successful in order to

be entitled to an award of costs; and that the award of the costs of the shed to the Appellant was a nominal one and as such, the Appellant was not successful.

We have considered the above arguments. It is trite that costs usually follow the event and that the power of the court to award costs is discretionary. It is also true that discretionary power should be exercised judiciously. We have taken this position in a plethora of decisions including the case of **General Nursing Council of Zambia vs. Mbangweta**[14] where we put it thus:-

> **"It is trite law that costs are awarded in the discretion of the Court. Such discretion is however to be exercised judicially. Costs usually follow the event."**

In **YB and F Transport Limited vs. Supersonic Motors Limited**[4], we discussed the exercise of the court's power when awarding costs and we put it as follows:-

> **"The general principle is that costs should follow the event; in other words a successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it."**

In **Collet vs. Van Zyl Brothers Limited**[3], the Court of Appeal stated that a trial judge, in the exercise of his discretion, should, as a matter of principle, view the litigation as a whole and see what was the substantial result and that where he does not do so, the Court of Appeal is entitled to review the exercise of his discretion.

Applying the above principles to the current case, the question is whether or not the learned Judge did not exercise her discretionary powers judiciously by awarding costs to the 1st Respondent against the Appellant despite both parties having succeeded and failed in some of their claims.

It is our firm view that the Appellant has not shown that the learned Judge did not exercise her discretionary powers judiciously when she arrived at her decision of awarding the costs to the 1st Respondent. We note that the 1st Respondent succeeded substantially in its claims against the Appellant while the Appellant only succeeded on the issue of the shed that it constructed on the 1st Respondent's premises.

We also note from the evidence on record that there was no lease agreement between the Appellant and the 1st Respondent. The learned Judge must have taken into account this fact in awarding the costs to the Respondents despite the fact that she allowed the claim by the Appellant for the costs incurred in constructing the shed. The 1st Respondent had to come to court to retake its premises. During the hearing of this Appeal, Counsel for the Appellant in fact confirmed that even at that time, the Appellant had not vacated the 1st Respondent's premises. We are persuaded that these are the circumstances upon which the court below exercised its discretionary power to award the costs to the 1st Respondent.

Therefore, the learned trial Judge cannot be faulted for awarding the costs of this case to the 1st Respondent who was the successful party. Ground 4 also has no merit and we dismiss it.

All the four Grounds of Appeal in this matter having failed, the sum total is that this Appeal has wholly failed. The same is dismissed with costs to the 1st and 2nd Respondents in this Court and in the court below.

.....
H. Chibomba
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

.....
R. M. C. K. Kaoma
SUPREME COURT JUDGE