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

APPEAL No. 70/2016
SCZ/8/46/2014

BETWEEN

PLIABLE ENGINEERING LIMITED **APPELLANT**

AND

FRIDAY SEBASTIAN MWAMBA **RESPONDENT**

CORAM: MAMBILIMA CJ, KAOMA AND KAJIMANGA, JJS.

On 4th October and 28th October 2016

FOR THE APPELLANT: Mr. G. Mhango of Messrs Nyangulu & Co., on behalf of Messrs MAK Partners

FOR THE RESPONDENT: Mr. S. A. G. Twumasi of Messrs Kitwe Chambers

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J U D G M E N T

Kajimanga, JS delivered the Judgment of the court

Cases referred to:

1. **Ndongo v Mulyango and Another (2011) Z. R. Vol 1 187**
2. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z. R. 272**

This appeal emanates from a judgment of the High Court dated 24th January, 2014 which upheld the respondent's claim against the

appellant and dismissed the appellant's counterclaim against the respondent.

On 5th October, 2006 the respondent (plaintiff in the court below) issued a writ against the appellant (defendant in the court below) endorsed with a claim for the sum of US$160,000.00 being an amount agreed by the parties as owing to the respondent for various amounts advanced and the investment made by the respondent in the appellant company, interest and costs. For its part, the appellant disputed the respondent's claim and counterclaimed damages for loss of profits/earnings due to the respondent's disruption of operations, the sum of US$63,000.00 per month effective mid-October 2006 to at least the end of December, 2007 plus the sum of US$18,000.00 for mobilization, an injunction restraining the respondent from interfering in the operations and business dealings of the appellant and interest.

The history of this case is that on 4th December, 2005 Integrated Solutions and Services in which the respondent was the sole director entered into a joint venture agreement with the appellant company. The purpose of the agreement was for the two parties to jointly execute a contract awarded to the appellant by Mopani Copper Mines

(MCM) for the long drilling of blast and support holes with an electro-hydraulic drilling at Mindola Subvertical shaft being contract number MC 2557.1. Pursuant to the joint venture agreement, directors of the appellant company agreed to cede 50% of their shares to Integrated Solutions and Services. On 30th June, 2006 the shareholders of the appellant company passed an extra ordinary resolution to the effect that the shares held by Integrated Solutions and Services in the appellant company be transferred to the respondent who then became the majority shareholder and partner in the joint venture.

By the terms of the joint venture agreement, the appellant and the respondent were required to contribute equally towards the financing of the project. The respondent accordingly made various payments and loaned monies to the appellant company.

The respondent's evidence in the court below was that sometime in December 2005 his secretary's husband one, Edmond Jika told him that he and his friend one, Gabriel Nkunika had been given a contract by MCM through their company, Pliable Engineering Limited worth US$770,000.00. He explained that they had a few days to move on site otherwise the contract may be cancelled. He told him

that he and his friend were prepared to give up 50% of the shares in the company to anyone who was ready to help them finance the project. The trio subsequently held a meeting which culminated in the execution of a joint venture agreement between Integrated Solutions and Services and Pliable Engineering Limited. At the said meeting it was also agreed that the respondent would help with the initial financing of US$18,400.00 for the purchase of second hand equipment to facilitate the commencement of operations and that he would get 50% shareholding in the appellant company.

The respondent testified that he paid US$18,400.00 pursuant to clause 6 of the joint venture agreement. After that he paid US$50,000.00 which was transferred to RDH Mining in Canada where the appellant company obtained a drilling machine. He made another payment to RDH Mining in the sum of US$40,000.00 and the total amount he spent came to US$108,400.00 and K148,396,554.00. He financed the project from his own resources and kept a schedule of the monies spent.

It was also his evidence that after a few months of operations he got concerned with the way the appellant company was being run and wrote a letter to his fellow shareholders. Subsequently, a

meeting was held with his fellow shareholders which did not yield any positive results. On 8th August, 2006 he wrote to his fellow shareholders on his decision to withdraw from the appellant company. In their response to his letter, they did not address his conditions for withdrawal. His claim was for payment of the amounts which he spent being US$108,400.00 and K148,396,554.00. The failure by the joint venture would have caused him loss as he was the only one providing funding and had his property worth more than US$600,000.00 pledged as collateral for the loan facility the appellant company had requested to finance the joint venture. He disputed the appellant's counterclaim, contending that he was made to withdraw from the appellant company because of the financial indiscipline exhibited by the other directors of the company. According to the respondent, his withdrawal was to protect his interests as there was no way, in such circumstances, the joint venture could be executed as expected.

Gabriel Nkunika testified on behalf of the appellant company. His evidence was that the respondent has no evidence of the loans he claims to have advanced to the appellant. The money he claims is what he put into the business after signing the joint venture

agreement. By clause 9 of the joint venture agreement, the expenses, losses, damages and taxes incurred in the project would be deducted from the profits in proportions to their shareholding. However, this could not happen because the respondent withdrew from the joint venture before any profits could be made from which he could have recovered his expenses. The appellant's counterclaim arises from the respondent's disruption of operations when he suddenly withdrew from the project and his cancellation of a loan finance from Africa Banking Corporation for no good reasons.

After considering the evidence and arguments of both parties, the learned trial judge found that it was not disputed that the respondent made payments towards the financing of the project. The payment of US$18,400.00 was acknowledged by the appellant in a document signed on 4th December, 2005 by the respondent and Gabriel Nkunika on behalf of the appellant. The sum of K125,896,554.00 was paid to the appellant in form of advances acknowledged at page 4 of the appellant's bundle of documents in the court below. US$90,000.00 was paid by the respondent as an advance towards the price of a rig which the appellant company is using in its operations.

The learned trial judge also found that the appellant did not dispute that the respondent made payments for the appellant company's benefits but argued that the payments were expenses put into the business after signing the joint venture agreement. That it was not in dispute that the respondent did not stay long enough as a director to a point when the company made profits from which he could have been paid his expenses but that this could not be a reason for him to be denied his claim as the appellant company continued to operate using the resources he provided which include machinery. He concluded that the respondent had made out his claim against the appellant on a balance of probabilities. He accordingly entered judgment in his favour in the claimed sums of US$108,400.00 or its Kwacha equivalent and K148,396,554.00 with interest and costs at the rate of 6% per annum from the date of the writ to the date of judgment and thereafter at the current bank lending rate.

The learned trial judge further found that there was no merit in the appellant's counterclaim as the respondent's action was not done in bad faith as alleged by the appellant. He accordingly dismissed the counterclaim.

Dissatisfied with this decision, the appellant has advanced four grounds of appeal. The first ground is that the court below misdirected itself both in fact and law when it decided in the last paragraph of page 9 of the judgment that the respondent's withdrawal from the appellant company was justified relying solely on the respondent's averment, that some shareholders of the appellant company were financially indisciplined, an averment which was not proved by the respondent. The second ground is that the court below erred both in fact and law when it decided that the respondent was entitled to withdraw the money he had put in the appellant company without first making a finding whether or not the appellant company had incurred any expenses, losses, damages or taxes at the time of the respondent's purported withdrawal from the appellant company. The third ground is that the lower court misdirected itself both in fact and law when it ignored some provisions of the agreement which the parties had made for themselves, the "JOINT VENTURE AGREEMENT", such as the provision that "ALL THE EXPENSES, LOSSES, DAMAGES AND TAXES INCURRED IN THE PROJECT SHALL BE DEDUCTED FROM THE PROFITS AND CONTRIBUTED TO BY INTEGRATED SOLUTIONS AND SERVICES (THE

PLAINTIFF'S PERSONAL COMPANY) AND PLIABLE ENGINEERING LIMITED (THE DEFENDANT) IN PROPORTION TO THEIR SHAREHOLDING." The fourth ground of appeal is that the lower court erred both in fact and law when it dismissed the appellant's counterclaim relying solely on the respondent's averment that his withdrawal from the appellant company was justified to protect his interest when the respondent never called any evidence at trial or at all, to prove that the other shareholders in the appellant company were financially indisciplined.

Both parties filed heads of argument in support of and opposition to the appeal on which they entirely relied. We hasten to mention that the heads of argument filed by the appellant were couched in a cavalier manner. In respect of ground one, the appellant's advocates after reciting the ground merely referred us to page 19 of the judgment appealed against.

In response to the first ground of appeal, Mr. Twumasi submitted that the learned trial judge was on firm ground when he found that the respondent was entitled to withdraw as a director in view of the financial indiscipline on the part of the other directors/shareholders of the appellant company. According to the

learned counsel, there was proof of financial indiscipline adduced in evidence which the lower court was entitled to rely on. He referred us to page 185, lines 21 – 25 and page 186, lines 1 – 13 of the record of appeal where the respondent said that:

> **"On 8th August 2006 I raised my concerns and told my fellow shareholders of my decision to withdraw from Pliable Engineering Limited. P4 of the Plaintiff's bundle of documents. This is the letter I wrote to my fellow shareholders of Pliable Engineering Limited. The other shareholders wrote to me accepting my withdraw without addressing my conditions for my withdrawal. (wt referred tp [to] P.21 Defendant's bundle of documents."**

The learned counsel contended that at page 57 of the record of appeal is the letter that the respondent referred to above. We were also referred to the document at page 54 of the record of appeal which shows that the respondent brought up the issue of financial indiscipline of the other directors/shareholders. The learned counsel further referred us to page 242, lines 1-6 where the appellant admitted that the respondent had raised the issue of financial indiscipline in the following testimony:

> **"Mr. Mwamba complained about management and accountability he raised this in a meeting as shown on page 1 of the plaintiff's bundle of documents which is a memorandum."**

Mr. Twumasi submitted that this evidence was not challenged in any way. He also contended that in making a decision that the respondent was entitled to withdraw, the trial court made a finding of fact based on the evidence before him. The learned counsel further submitted that this court has said in a number of authorities such as **Ndongo v Mulyango and Another**[1] and **Wilson Masauso Zulu v Avondale Housing Project Limited**[2] that the Supreme Court will not reverse a finding of fact unless it is satisfied that the findings in question were perverse or made in the absence of relevant evidence or upon a misapprehension of facts. The learned counsel accordingly submitted that there is no merit in the first ground of appeal.

The same cavalier approach was adopted by the appellant's advocates when dealing with the second ground of appeal. They merely referred us to the joint venture agreement without proffering any explanation or argument.

In response to ground two, Mr. Twumasi submitted that the trial judge was on firm ground when he decided that the respondent was entitled to withdraw his monies. He referred us to clause 9 of the joint venture agreement which appears at pages 27 – 32 of the

record of appeal as follows:

> **"All the expenses, losses, damages and taxes incurred in the project shall be deducted from the profits and distributed to INTERGRATED SOLUTIONS & SERVICES and PLIABLE ENGINEERING LTD in proportion to their shareholding."**

The learned counsel submitted that the appellant admitted that all the amounts claimed were paid by the respondent into the company and therefore he was entitled to the same. He referred us to the judgment of the trial court at page 16, lines 22 – 24 and page 17, lines 1-5 of the record of appeal where the trial court found as a fact, the following:

> **"It is not in dispute that the Plaintiff did not stay long enough as a Director to a point when the company made profits from which he could have been paid his expenses but that cannot be a reason for him to be denied these as the company continued to operate using the resources he provided which included machinery. The Plaintiff is still a shareholder in the company. He provided funds for the operation of the Defendant company over and above his subscriptions for the share he has in the company."**

According to the learned counsel, these are findings of fact based on the evidence adduced before the court. Furthermore, counsel contended, the evidence on record shows that the amounts claimed were lent to the appellant company and therefore, the

respondent was entitled to claim the same. We were referred to the respondent's evidence at page 211, lines 8 – 10 of the record of appeal to the following effect:

> **"The investment was lending to PLIABLE"**

We were also referred to the respondent's evidence at page 212, lines 6 – 10 of the record of appeal to the effect that:

> **"The lending had no conditions. The US$50,000 and $40,000 were monies paid on my behalf by NECOR Zambia Limited to RDH of Canada. NECOR Zambia owed me monies as dividends for my shareholding."**

We were again referred to the following evidence of the respondent at page 214, lines 5 – 10 of the record of appeal:

> **"I claim the money and US$18,400 was received by the director of Pliable. US$90,000 was paid on behalf of Pliable. US$18,400 came into the hands of Pliable Engineering."**

The learned counsel also brought to our attention the following evidence of the respondent at pages 216 – 217, lines 19 – 25 and lines 1 – 7 of the record of appeal:

> **"It is true I leant [lent] monies to Pliable. It was agreed that the monies would be paid back to me. I was giving money to Pliable so that the company would invest in operations and other matter[s] of**

operation. The amounts were to be gotten back as soon as there were profits. If no profits were made, we would go to the investment i.e. the assets to get our money back. The time I was leaving the tangible assets were there. There was a truck [worth] million (wt referred to Plaintiff's bundle of pleadings page 7 para 13)."

We were further referred to the following evidence of the respondent at page 220, lines 6 – 8 of the record of appeal:

"All I need is the money I lent, not profits but interest thereon."

And at page 244, lines 8 – 9 of the record of appeal, the following evidence of the appellant was brought to our attention:

"We agreed to refund US$70,000.00 to Mr. Mwamba."

The learned counsel submitted that at page 246, lines 20 – 24 of the record of appeal, the appellant admitted that the amount was due to the respondent as follows:

"Mr. Mwamba is due US$70,000.00 and the US$90,000.00 may be due to Mr. Mwamba. The document shows otherwise."

It was also submitted that at page 255 [245] lines 24 – 25 and page 246, lines 1 – 9 of the record of appeal, the appellant accepted

that the amounts were due to the respondent as follows:

> **"Mr. Mwamba was entitled to the US$90,000.00 from RDH. Hence his claim for US$70,000. RDH Canada were not paid US$90,000. He was not refunded the US$90,000. Pliable and Mopani [are] owing [the] Plaintiff. I do not know. If RDH was paid less Mr. Mwamba would have been entitled to the same from us."**

The learned counsel further contended that at page 241, lines 4 – 12 of the record of appeal, the appellant admitted that the amounts were loans made by the respondent as follows:

> **"Page 1 of the 3rd Supplementary shows a list of monies that Mr. Mwamba (Plaintiff) provided. This is a shareholder loan to Pliable by Mr. Mwamba (Plaintiff). The figures in both Dollars and Kwacha which is US$108,400 and in Kwacha K126,896,554 and K22,600,000 for equipment, while the company proceeded there were difficulties between shareholders."**

Mr. Twumasi submitted that the findings of fact by the learned trial judge were made on the basis of the admissions made by the appellant in their evidence and were not perverse or made in the absence of evidence. He contended that this ground must also fail. The learned counsel finally submitted that this appeal must be dismissed with costs.

The appellant did not argue the third and fourth grounds of appeal in its heads of argument. We therefore deem them to have been abandoned.

We have considered the record of appeal, the judgment of the trial court appealed against and the heads of argument filed on behalf of the parties. In the grounds of appeal, the appellant assails the findings of fact by the learned trial judge. This court's approach in dealing with appeals of this nature is well settled. In the **Wilson Masauso Zulu**[2] case, we stated as follows:

> **"The appellate court will only reverse findings of fact made by a trial court if 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."**

In the **Ndongo**[1] case, this court expanded the above principle in the following words:

> **"An 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 misapplication of facts, or that they were findings which on a proper evidence, no trial court acting correctly can reasonably make."**

In the first ground of appeal, the appellant asserts that the court below misdirected itself when it decided that the respondent's withdrawal from the appellant company was justified solely on the respondent's averment, that some shareholders of the appellant company were financially indiscipline, an averment which was not proved by the respondent. We observed earlier that the appellant's advocates, after reciting the first ground of appeal, merely referred us to page 19 of the judgment appealed against. We note from the record of appeal that the said judgment ends at page 18 while at page 19 of the record is the writ of summons. It is obvious to us that the writ of summons, if that is what the appellant intended to rely upon in arguing the first ground of appeal, has no relevance to that ground. In short, no argument has been advanced by the appellant's advocates in respect of ground one.

We agree with the learned counsel for the respondent that there was proof of financial indiscipline adduced in evidence which the learned trial judge relied upon. The respondent's evidence on financial indiscipline appears at pages 185, lines 21-25 and page 186, lines 1 -13 of the record of appeal as quoted by the learned

counsel for the respondent. The internal memorandum referred to in the respondent's evidence is at page 57 of the record of appeal and it is self-explanatory. It is reproduced below as follows:

"PLIABLE ENGINEERING LIMITED

To:	**Pliable Shaeholders – Mr. Gabriel Nkunika Mr. Edmond J Banda**
From:	**Friday Mwamba**
Subject:	**GOVERNANCE OF PEL – DECISION TO WITHDRAWAL**
Date:	**Tuesday, August 08, 2006**
c.c.	

Dear Gentlemen

Needless to over-emphasize that we failed to move in tandem as Directors and shareholders with a common goal. My personal efforts to bring sanity and good governance in the organization seem to have failed. I have presided over several board meetings and no resolutions have been respected.

1) **Management – issues of management have been ignored. If I may repeat my words in one of my memos to you, the company continues to be run like a "kantemba".**
2) **Accountability – we have failed to account for usage of funds, let alone keep any books of account, and my attempts to bring sanity have been resisted.**
3) **Recapitalization – it is a known fact that due to mismanagement of funds, the only option left to breathe new life into the operations is to recapitalize the company. I have offered several options and none has been taken kindly.**

I have now come to the decision that I pull out of the PEL and leave it to the original founders to steer in the direction they wish to. As I pull out, you have two options:

1) **That the remaining shareholders refund me all my investment, currently around US$70,000 (excluding the deposit paid to RDH).**
2) **That I call for voluntary winding up of PEL so that I can salvage whatever remains from the remaining assets of PEL.**

I look forward to your quick response on how my investment shall be refunded.

Wishing you the best of luck and regards.

Signed

Fiday S Mwamba

Director & Shareholder"

Another internal memorandum from the respondent whose subject was "CONCERNS ON PLIABLE ENGINEERING GOVERNANCE" produced in the court below appears at pages 54 – 56 of the record of appeal. At page 1 in paragraph three thereof, the respondent stated, among other things, as follows:

"... to date, I have observed that what is on the ground does not give me comfort at all:

1) ...
2) ...
3) ...
4) **No proper books of accounts, no VAT**

5) To date, we have failed to come up with a business financial plan – there is no profit and loss.

6) ..."

At page two of the memorandum, the respondent stated in the second paragraph that:

"... Now I must stress here that shareholders need to see their funds being accounted for in the proper books of accounts, and more importantly used as per approved plans..."

And in his evidence at page 242, lines 1 – 6 of the record of appeal, the appellant's witness (DW1) confirmed in his testimony that the respondent complained about management and accountability in their meeting.

From the foregoing, we are satisfied that there was sufficient evidence on which the learned trial judge predicated his finding that the respondent's withdrawal from the appellant company was justified. Since his finding was neither perverse nor made in the absence of relevant evidence or upon a misapprehension of the facts, we do not find any basis to reverse his finding. We, therefore, find no merit in the first ground of appeal.

In ground two, the appellant's assertion is that the court below

erred when it decided that the respondent was entitled to withdraw the money he invested in the appellant company without first making a finding whether or not any expenses had been incurred by the appellant company at the time of his purported withdrawal from it. In support of this ground, the appellant merely stated in its heads of argument that "WE REFER TO THE JOINT VENTURE AGREEMENT" without advancing any argument.

As we see it, the appellant has anchored the second ground of appeal on clause 9 of the joint venture agreement. The import of clause 9 in relation to the respondent's claim is that all expenses incurred by the respondent ought to be deducted from the profits. The learned trial judge found from the evidence before him, that there was no dispute that the respondent did not stay long enough as a director to a point when the appellant company made profits from which he could have been paid his expenses. Further, that this could not be a reason for him to be denied his claim as the appellant company continued to operate using the resources he provided which include machinery; and that he provided funds for the operations of the appellant company over and above his subscriptions for the share

he has in the company.

As aptly submitted by Mr. Twumasi, there is evidence on the record indicating that the amounts claimed by the respondent were lent to the appellant company by him. This evidence as adduced by the respondent and the appellant's witness, has been appropriately identified and quoted in the respondent's heads of argument. It was from this evidence that the learned trial judge made his findings of fact discussed above. Equally on this ground, we do not find that the learned trial judge's findings of fact were perverse or made in the absence of relevant evidence or upon a misapprehension of facts. For this reason, the second ground of appeal also fails.

In the final analysis, we conclude that this appeal has no merit. The upshot of this conclusion is that the judgment of the court below is upheld. We award costs to the respondent, to be taxed in default of agreement.

I. C. Mambilima
SUPREME COURT JUDGE

R. M. C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE