IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO./195/2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ACKSON TEMBO	**APPELLANT**
AND	
WANG JIN CHENG	**RESPONDENT**

Coram: Siavwapa, JP, Chishimba and Banda-Bobo, JJA.
On 22nd September, 2023 and 19th January, 2024.

For the Appellant: **Mr. M. Nyirenda of Messrs SLM Legal Practitioners**

For the Respondent: **Mr. Simunyola of Messrs Eric Silwamba and Jalasi Legal Practitioners**

JUDGMENT

Banda-Bobo, JA delivered the Judgment of the Court.

Cases referred to:

1. Sithole v The State Lotteries Board (1975) Z.R. 106
2. Zambia Railways Limited v Pauline S Mundia & Brian Sialumba (2008) Z.R. 287 Vol 1
3. Nkhata and Four Others v The Attorney General of Zambia (1996) Z.R. 124,
4. Metal Fabricators of Zambia v Washington Zimba (SCZ/170/2002),
5. Eagle Charalambous Transport Limited v Gideon Phiri (SCZ Judgment No.8 of 1994),
6. Majory Mambwe Masiye v Cosmas Phiri (2008) Z.R. 56 Vol 2,
7. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172 (SC),
8. Attorney-General v Marcus Kampumpe Achiume (S.C.Z Judgment No.2 of 1983),
9. Mohamed v Attorney-General (1982) ZR 49 (S.C.)

Legislation referred to:-

- The Court of Appeal Rules (CAR), 2016
- Article 118(2)(e) of the Constitution

1.0. INTRODUCTION

1.1 This is an appeal against the Judgment of Honorable Judge P. K. Yangilo delivered on 21st June, 2021 in the High Court of Zambia at Lusaka.

2.0. BACKGROUND

2.1 The brief background to this matter is that the Respondent was a Chinese national engaged in the importation of timber from various jurisdictions into the Republic of China. The Appellant was a registered dealer in raw timber including Mukula tree species as a licensed exporter. The Respondent had previous dealings with the Appellant where he delivered copies of the Bills of lading to the Respondent as an incident of the completion. In April, 2017, the Respondent met the Appellant in Lusaka and it was agreed that the Appellant would secure and export Mukula tree logs to the Republic of China. The terms of the agreement included an obligation to procure Mukula tree logs, facilitate its shipment, and thereafter deliver Bills of lading to the Respondent.

2.2 The Respondent alleges to have issued the sum of United States Dollars US$907,900.00, for purchasing of the Mukula tree logs to the Appellant, receipt of which was acknowledged by the Appellant in writing. The Respondent further alleges that the Appellant has not delivered the Mukula tree logs and has adamantly refused, failed, and/or neglected to deliver the timber or refund the Respondent his monies.

2.3 The Appellant alleged that his role in the transaction was to merely facilitate the securing and exporting of the said Mukula tree logs and that the Respondent was to pay for their shipment to China. He denied owing the Respondent the sum of US$907,900.00 and that the suit by the Respondent was merely a gimmick to wash his hands off the 17 containers and reclaim the amounts paid for the purchase of the said containers an arrangement that had been frustrated by the Government ban and not the Appellant. The Respondent commenced proceedings and sought the following reliefs:

(1). The sum of USD 907,900.00 on account of money had and received by the Defendant for use of the Plaintiff;

(2). Damages for fraudulent misrepresentation;

(3). Damages for loss of use of funds;

(4). Interest on sums payable at the current Bank of Zambia lending rate and;

(5). Costs.

3.0. **DECISION OF THE LOWER COURT**

3.1 The Judge found that in December, 2016 the Appellant and Respondent entered into an oral contract for the supply and purchase of Mukula tree logs. She found that the Respondent's obligation was to provide funds for sourcing and exporting the Mukula tree logs, while the Appellant's obligation was to source the Mukula tree logs and export them to China. Following the shipment, the Appellant was required to deliver Bills of Lading with respect to the exported logs to the Respondent.

3.2 The Judge in her analysis regarding the acknowledgement of debt being claimed by the Respondent assessed that the same did not amount to an admission. She found that the debt admission was equivocal as the Appellant raised a defense to it. Therefore, she dismissed the Respondent's claim that the said acknowledgment of debt was an admission.

3.3 However, in answering the question of whether the Respondent was entitled to the sum of US$907,900.00 and damages for loss

of use of funds, she found that the document the Appellant signed was intended to be an acknowledgment of debt for the sum of US$907,900.00 that he owed to the Respondent. In her analysis the learned Judge found that the Appellant would only proceed to procure and export the Mukula tree logs after the Respondent had paid. Therefore, she found that the Appellant had 7 containers of Mukula tree logs awaiting exportation. That this was corroborated by the testimony of DW2. That this proved on a balance of probability that the Appellant was availed an amount of money to source and export the Mukula tree logs, but that he had not done so. She found that the Appellant owed the Respondent the claimed amounts.

3.4 As regards the defence put up by the Appellant regarding the government ban on the exportation of Mukula tree logs she held that the contract between the parties ceased to be binding on them following the implementation of the ban. Thus, the trial Judge held that the Appellant could not in the circumstances be held liable for his failure to procure the export of Mukula tree logs after 31st January, 2017. However, neither the Respondent nor the Appellant led evidence before court that could reveal how many containers the Appellant had managed to source and export to

China under the agreement before the ban was effected thereby failing to demonstrate to the court how much of the sum of US$907,900.00 that he owed the Respondent was used to meet his obligation under the contract.

3.5 That being said, she found that in order to avoid unjust enrichment of the Respondent, she ordered that the sum of money owed to the Respondent by the Appellant be assessed and determined by the Deputy Registrar. The sum determined would be paid to the Respondent with interest from the date of originating process to the date of judgment at the short-term bank of Zambia deposit rate thereafter at the current commercial bank lending rates.

3.6 With regard to the Respondent's claim for damages for loss of use of funds, she found that the said claim should have been accompanied by detailed evidence to support such damages. She thus dismissed the claim for loss of use of funds for lack of evidence in support of the claim.

3.7 The learned trial Judge also considered the issue of whether the Respondent was entitled to damages for fraudulent misrepresentation. She found that the element of the alleged representation being false had not been proved to the standard

set out in the case of **Sithole v The State Lotteries Board**[1]. She found that the Respondent did not provide any proof to show that the Appellant was being deceitful when he made the said representation that he had a valid license to export Mukula tree logs and that the element of recklessness had not been proved. On a balance of probability, she found that he Appellant was able to legally export the Mukula tree logs to China despite his failure to produce his export license at trial.

3.8 The learned trial Judge also found that though the Respondent proved that the Appellant fraudulently misrepresented himself, the Respondent did not lead evidence in support of his claim for damages. She dismissed the claim for fraudulent misrepresentation.

4.0. **THE APPEAL**

4.1 The Appellant, dissatisfied with the Judgment of the lower court has now appealed to this Court on the following two grounds

1. GROUND One:

The Court below erred in and in fact when it found that the Appellant owed the Respondent a sum of US$907,900.00 as at April, 2017; and

2. **Ground Two: The Court below erred in law and in fact in ordering that the sum of money owed to the Respondent be assessed by the Deputy Registrar on the basis of the finding that USD907,900.00 was owed to the Respondent.**

5.0. **ARGUMENTS IN SUPPORT**

5.1 Counsel for the Appellant filed his heads of argument on 26th August, 2021 and submitted in ground one that the trial Court at paragraph 5.9 of its judgment at page 36 of the Record of appeal dismissed the first issue and found that the said acknowledgment of debt did not amount to an admission. Further, in paragraph 5.16 of the Judgment on page 38 and 39 of the Record of appeal, the court found that the Respondent had not produced other evidence to demonstrate the amounts of money that he paid to the Appellant and the frequency with which he made the payments to enable the Court to determine how the sum of USD907,900.00 being claimed accumulated. Further, that the Court refused to rely on the evidence that the Respondent attempted to produce as an explanation of how the amount of USD907,900.00 was arrived at.

5.2 Counsel contended that a consideration of these parts of the Judgement of the lower court confirms the fact that the trial Court did not regard the Appellants writing as an acknowledgment of debt upon which liability could be attached to the Appellant. It was Counsel's contention that the lower Court fell into error in finding the Appellant liable for the said amount yet in the first instance it found that the acknowledgement of debt in issue did not address the defence over the acknowledgement of debt in his pleadings. Further, he argued that the Respondent's own pleadings could not support the Appellant's response to the acknowledgement of debt and were not consistent with his own evidence.

5.3 Counsel argued further, that the lower court shifted the burden of proof on the Appellant to prove his defence as regards the acknowledgement of debt upon which the Respondent relied, rather than ascertaining from cogent or independent evidence from the Respondent as to how much was paid to the Appellant and what was outstanding. Counsel referred to the case of **Zambia Railways Limited v Pauline S Mundia & Brian Sialumba**[2] and **Khalid Mohammed v The Attorney General**[3] on the standard of proof required in civil cases. Counsel submitted that in casu, the

learned trial Judge fell into grave error when she found that the Appellant owed the Respondent a sum of USD907, 900.00 solely based on the purported acknowledgment by the Appellant admitting to owing the said amount.

5.4 It was his submission that the court below, having found that the letter appearing at pages 65 and 151 of the record of appeal was not an admission by the Appellant and the Respondent not having adduced any corroborative evidence to support his claim, meant that the Court below had no legal or factual basis for arriving at the finding that the Appellant was indebted to the Respondent to the tune of USD907,900.00 as at April, 2017.

5.5 Under ground two, Counsel submitted that the court below erred in law and in fact in ordering the sum of money owed to the Respondent be assessed and determined by the Deputy Registrar on the basis of finding that USD907,900.00 was owed to the Respondent. In arguing this ground, Counsel contended that the learned trial Judge erred in ordering an assessment of the money owed to the Respondent from the standpoint that the Appellant owed the Respondent the sum of USD907,900.00, which the Respondent failed to prove on a preponderance of probabilities. He argued that this was because the burden was shifted to the

Appellant to file evidence in Court that would reduce his potential liability to the Respondent rather than the Respondent being the party to adduce evidence of the sums he alleges to have paid out to the Appellant.

5.6 Counsel prayed that this ground should succeed too.

6.0. **ARGUMENTS IN OPPOSTION**

6.1 The Respondent Counsel filed in heads of arguments on 29th July, 2022. The Respondent raised a Preliminary Issue regarding the manner in which the grounds of appeal have been prepared. Counsel submitted that the said grounds of appeal did not comply with the rules of this Court. He contended that ground one does not point out the actual legal and factual issues. Further, that the said ground ought to have been prepared in accordance with the provisions **Order X Rule 9 of the Rules of the Court of Appeal Rules**. Counsel submitted that ground one did not amount to an objection to the Judgment to qualify as a basis for an appeal as set out by the above cited rules. Counsel submitted that the same was irregular and is not prepared in accordance with the said rules and the same should therefore be dismissed with costs.

6.2 Moving on, Counsel proceeded to analyze ground one and contended that in the Judgement the trial Judge did not in any way suggest that the Respondent's entire claim was dismissed, further that the trial Judge was actually determining the question as to whether the acknowledgment of the debt amounted to an admission. Counsel invited this Court to pay attention to paragraph 5.16 of the judgment on page 38-42 of the Record of appeal and submitted that the excerpt of the Judgment is an analytical assessment by the learned trial Judge which demonstrates how the Judge arrived at her conclusion without any misdirection as asserted by the Appellant. Further, Counsel submitted that the trial Judge was on firm ground to hold in favour of the Respondent as her findings were based on the Respondent's documentary evidence of the acknowledgement of debt at page 1 of the Amended Plaintiff's Bundle of Documents as per page 149-154 of the Record of appeal.

6.3 Counsel submitted that the learned trial Judge's findings were not only based on one piece of evidence but also on other pieces of evidence such as the testimony of PW2 found on page 152 and 373 of the record of appeal and the acknowledgment of debt of K400,000.00. Counsel submitted that it was manifestly clear that

the Appellant admitted receiving money from the Respondent for the purchase and shipment of the Mukula tree logs to China. Counsel prayed that the learned trial Judge rightly held that the Appellant owed the Respondent the sum of USD907,900.00 as at April, 2017 and that the appeal lacks merit and should be dismissed forthwith.

6.4 Additionally, Counsel submitted that the Appellant's argument that the learned trial Judge based her judgment on the Respondent's submission in which the Respondent stated that the defence raised by the Appellant at trial on the acknowledgement of debt was not raised in the pleadings is misplaced. He submitted that in arriving at the sound reasoning in the judgment by the learned trial Judge she based her findings of fact which remained unchallenged at trial by the Appellant and cannot be reversed by this Court as the same is not perverse. He reiterated his position that ground one lacked merit with no chance of success and that it should be dismissed accordingly.

6.5 Underground two, Counsel submitted that the Appellant failed to prove the case on a preponderance of probability. He submitted that the Appellant's arguments that the learned trial Judge erred in ordering an assessment of the money owed to the Respondent

from the standpoint that the Appellant owed the Respondent the sum of USD907,900.00 is misplaced and has no prospects of success.

6.6 Counsel contended that the learned trial Judge made an analysis of the acknowledgment of debt vis-a- vis citing Halsbury's Laws of England and cited the circumstances under which the said acknowledgment of debt was made. He argued that the learned trial Judge found from an admission of the debt that, there were no circumstances suggesting something else but confirming that the Appellant owed the Respondent money.

6.7 He further submitted that, a demonstration on how the learned trial Judge arrived at her logical conclusion that the Appellant owed the Respondent was based on both the documentary and oral evidence by the Appellant and the Respondent during trial. Counsel submitted that the acknowledgment of debt and failure to challenge the Respondent's oral evidence by the Appellant when the Respondent testified that the Appellant wrote and executed the acknowledgment of debt amplifies the weight of evidence to support the Respondent's claim against the Appellant. He submitted that ground two was flimsy with no prospects of success and should therefore be dismissed with costs.

6.8 Counsel submitted that it is trite law that findings of fact of the trial court must not be interfered with if they were supported by evidence of the party in whose favour the court rules. He submitted that the judgment of the learned trial Judge arrived at her findings in a logical manner and analyzed her findings sufficiently. Counsel thus, submitted that the findings by the learned trial Judge were not perverse and that trial was properly conducted. To support the foregoing, Counsel referred to the cases of **Nkhata and Four Others v The Attorney General of Zambia**[3], **Metal Fabricators of Zambia v Washington Zimba**[4] **Eagle Charalambous Transport Limited v Gideon Phiri**[5], **Majory Mambwe Masiye v Cosmas Phiri**[6].

6.9 Counsel submitted that the finding of fact of the Court below was supported by evidence. Counsel explained that the Judgment of the lower court, apart from the evidence of the acknowledgment of debt of US$400,000.00, she also took into account the testimony of PW2 where he confirmed taking the money to the Appellant on two occasions.

6.10 He submitted that the findings of fact should not be reversed unless the same are perverse and not supported by evidence and that the grounds of appeal lack merit and should be dismissed. He submitted that the Appellant has failed to discharge the

burden of proof or threshold to warrant this Court to overturn the Judgment under consideration and prayed that the appeal be dismissed with costs.

7.0. **HEARING**

7.1 At the hearing both parties relied on their heads of argument and skeleton arguments filed into Court. Mr. Simunyola, Counsel for the Respondent, augmented briefly that this court should uphold the judgment of the lower court to allow the Respondent to enjoy the fruits of his judgment and prayed for costs.

7.2 In reply, Mr. Nyirenda submitted that the lower court erred when it refused to acknowledge the debt in light of the fact that there was no evidence to support the Respondent's claim of USD907,900.00. He thus urged this court to send the matter back to the High Court.

8.0. **DECISION OF THIS COURT**

8.2 Having carefully considered the record of appeal, the impugned judgment and the submissions, we are of the view that both grounds relate to upsetting the findings of fact by the trial Judge and should be argued together as they are interlinked.

8.3 We will begin by addressing the Preliminary Issue raised by the Respondent, that the Appellant failed to make out the objection and demonstrate the basis of this appeal. Further, that he failed to set out the grounds of objection to the learned trial Judge's judgment and failed to adhere to **Order X Rule 9 of the Rules of the Court of appeal, 2016** which provides guidance on how grounds of appeal ought to be prepared.

8.4 In our considered view, a perusal of the grounds of appeal show that the grounds as presented have failed to specify the points of law or fact which are alleged to have wrongly been decided as per **Order X Rule 9 of the Court of appeal, 2016**. We agree with Counsel for the Respondent that the grounds do not contain any grounds of objections to the Judgement or any points of law or facts that the Appellant alleges have been wrongly decided and are being appealed against.

8.5 However, that being said, **Article 118(2)(e) of the Constitution** enjoins us not to have undue regard to procedural technicalities in our role as dispensers of justice. Therefore, in the interest of justice, we shall consider the appeal as it has been filed and warn Counsel for the Appellant that adherence to the rules of procedure

must be followed by all parties to allow for the fair dispensation of justice.

8.6 Reverting to the appeal, the main contention in our view is that the Judge in the court below erred by passing Judgment in favour of the Respondent without considering the Appellant's evidence and that the trial Judge shifted the burden of proof from the Respondent to the Appellant in her analysis of the evidence when she ordered that the sum of money owed be assessed and determined by the Deputy Registrar.

8.7 It is trite that courts are enjoined to hear all parties in a matter and determine all issues in controversy. In the case of **Wilson Masauso Zulu v Avondale Housing Project**[7] the Supreme Court observed that:

"All these matters called for adjudication but, unfortunately, were left undetermined. I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality." (emphasis by this Court)

8.8 Further, in the case of **Attorney-General v Marcus Kapumpe Achiume**[8] the Supreme Court held:

"An unbalanced evaluation of the evidence, where only the flaws of one side but not the other are considered, is a misdirection which no trial court should make, and entitles the appeal court to interfere."

8.9 The Supreme Court has provided guidance on when an appellate court can reverse findings of fact by a lower court. This was in the case of **Mohamed v Attorney-General[9],** where Ngulube, DCJ, as he then was, held inter alia that:

"The appellate court may draw its own inferences in opposition to those drawn by the trial court although it may not lightly reverse the findings of primary facts."

8.10 The contention in ground one by the Appellant is that the Court erred in law and fact when it found that the Appellant owed the Respondent the sum of USD907,900.00. While the Respondent contends that the learned trial Judge fell into grave error by holding that the Appellant owed the amount of USD907,900.00 based on the purported acknowledgment by the Appellant when in her judgment she stated that the acknowledgment by the Appellant did not amount to an admission.

8.11 An excerpt from the learned trial Judge's judgment at page J33-J37 in particular paragraph 5.16 at pages 38 to 42 of the record of appeal reads as follows:

> **"on the strength of the foregoing authorities and my analysis of the plaintiff's evidence before me, I find that aside from the Defendant's acknowledgment of receipt of the sum of K400,000.00 and PW2's testimony that he delivered the sum of K1,000,000.00 to the Defendant on the Plaintiff's behalf, the Plaintiff has not produced other evidence to demonstrate to this Court the amounts of money that he paid to the Defendant and the frequency with which he made the payments to enable this Court to demonstrate how the sum of money was accumulated."**

8.12 The above excerpt of the Judgment demonstrates the analysis of the learned trial Judge and how she came to her findings. Her findings were based on the Respondent's documentary evidence of the acknowledgment of debt and that the Appellant did not dispute drafting and executing the said acknowledgment of debt. Furthermore, the learned trial Judge also relied on the evidence of PW2's testimony.

8.13 A perusal of the Judgment at page J36 and J34, paragraph 5.23 and 5.24 at page 41 and 42 of the Record of appeal reveals the learned trial's Judge's mind in adjudicating as she did:

> **"Having determined that the Defendant's testimony was not reliable, it follows therefore, that I must make a determination based on the available evidence of whether the said acknowledgment of debt was a sufficient acknowledgment to demonstrate that the Defendant owed the Plaintiff the sum of US$907,900.00 in question. I am persuaded by the learned authors of Halsbury Laws of England who guide as follows regarding an acknowledgment:**
>
> > **In judging whether a document is sufficient acknowledgment, the Court will look at the circumstances in which it was written and it will construe it in the way in which the writer intended it to be construed by the person who it is addressed"**
>
> **Based on the forgoing, authority and my analysis of the acknowledgment of debt on record, as there are no circumstances on record to suggest that the acknowledgment of debt executed by the Defendant was made as a pretext to secure the finding for the Plaintiff., I find that the Defendant herein intended for this document to be an acknowledgment of the debt of US$907,900.00 that he owed the Plaintiff. My decision**

is further fortified by the terms of the agreement which reveal that it was only when the Plaintiff made a payment to the Defendant that the Defendant would proceed to procure and export Mukula tree logs. Therefore, the Defendant's admission that he had 7 containers of Mukula tree logs awaiting exportation which was corroborated by the testimony of DW2, proves on a balance of probability that the Defendant was availed an amount of money to source and export the Mukula tree logs, but he had not done so, Accordingly I find that the Defendant owed the Plaintiff the sum of US$907,900.00 as at April, 2017."

8.14 We find that this is not a fit and proper matter for this Court to reverse the Judgment of the learned trial Judge. The Appellant has failed to demonstrate why we should reverse the findings of fact. In addition, findings of fact by a trial Court must be such that they are not supported by the evidence proffered or that they are perverse.

8.15 In our view, the learned trial Judge did not misdirect herself in the evaluation of the evidence and conclusion by finding that the Appellant owed the Respondent the sum of USD907,900.00 as at April, 2017. Therefore, having found that the Appellant owed the amounts in question, she was justified to have found that in order

to avoid unjust enrichment by the Respondent, the Appellant owed the Respondent the said sums.

8.16 However, we are of the view that since the amount owed was ascertained, there was no need for the learned trial Judge to have ordered that the money owed by the Appellant be assessed and determined by the Deputy Registrar. The learned trial Judge should have simply awarded the Respondent the sum of USD907,900.00, having found on a balance of probability, that the Appellant had received the said amount. That part of the judgment is set aside. In its place, we order the payment of US$907,900, as found.

8.17 We find that the appeal lacks merit and is dismissed. Costs for the Respondent to be taxed in default of agreement.

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M. J. SIAVWAPA
JUDGE PRESIDENT

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE