

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

**SCZ/8/08/2023**



**BETWEEN:**

**FINSBURY INVESTMENTS LIMITED**

**APPELLANT**

AND

**MURRAY AND ROBERTS CONSTRUCTION  
LIMITED**

**1<sup>ST</sup> RESPONDENT**

**KADDOURA CONSTRUCTION LIMITED**

**2<sup>ND</sup> RESPONDENT**

**Coram: Malila, CJ, Kaoma and Kabuka, JJS**

On 6<sup>th</sup> February, 2024 and 24<sup>th</sup> July, 2024

**For the Appellant:**

Mr. M. Mando, Messrs. Mando and Passi,  
Advocates.

Mr. L. Mwamba, Messrs. Mwamba and  
Milan Advocates.

**For the Respondents:**

Mr. C. M. Sianondo, Messrs. Malambo and  
Company.

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## **J U D G M E N T**

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**Kabuka, JS**, delivered the Judgment of the Court.

**Cases referred to:**

1. Teichmann Zambia Limited v Mumana Pleasure Resort and Puma Energy Zambia Plc Appeal No. 196/2014

2. Agape Gardens Limited & 2 Others v Coffee Board of Zambia & Another, Appeal No. 138 of 2009
3. L. Simbeye Enterprises Limited & Another v Ibrahim Yousuf, SCZ Appeal 171 of 1999
4. Mileta Pakou and Others v Rudnap Zambia Limited (1998) ZR 233

**Legislation and Other Works referred to:**

1. High Court Rules Order XXX rule 14, Cap.25
2. The Lands and Deeds Registry Act Cap. 185 SS. 4, 6 and 7
3. English Law (Extent of Application) Act, Cap. 11 S.2
4. Foreign Judgments (Reciprocal Enforcement) Act Cap. 76 S.3
5. Halsbury's Laws of England, Third Edition, Volume 24 paragraphs 285, 286, 301, 304
6. Atkin's Court Forms, 1992 Edition, Butterworths, London, Vol 28, page 21

**Introduction**

1. This appeal by the appellant is against a Court of Appeal judgment dated 18<sup>th</sup> May, 2022 wherein it was determined that the respondents had demonstrated sufficient interest in the subject matter of a High Court mortgage action in Cause No. 2020/HPC/0362, and were entitled to an order for joinder to the action.
2. The action had been settled through a consent judgment entered into on 29<sup>th</sup> June, 2020 by the parties, being, Finsbury Investments Limited and Lusaka Premier Health Clinic Limited ("LPHCL"), a related entity.
3. The respondents contended that the appellant, Finsbury Investment Limited being a majority shareholder in LPHCL, the

consent judgment was procured by the said related entities through fraud, collusion, misrepresentation or mistake. The respondents were seeking to be joined to the action for the sole purpose of challenging the consent judgment and have it set aside.

4. Aggrieved by the Court of Appeal judgment that ordered joinder of the respondents to the High Court action in issue, the appellant initially sought leave to appeal the judgment before that Court. When leave was declined, the appellant successfully renewed its application before a single judge of this Court and proceeded to file a notice of appeal.
5. In the notice of appeal, as amended with leave of court on 28<sup>th</sup> September, 2023 however, the appellant shifted the focus of its' grievance from faulting the Court of Appeal order for joinder of the respondents to Cause No. 2020/HPC/0362. The appellant now stated that it was appealing against "*part of the judgment as decided the issue of applicability of the law on mechanic's lien*".

### **Background**

6. The history of the case, to the extent that it is relevant for the determination this appeal, is that, the 2<sup>nd</sup> respondent in the Court of Appeal, LPHCL, was the registered proprietor of a piece of 4.067

hectares land, known as Stand No. 1292, Chelstone, Lusaka ("the Property").

7. LPHCL resolved to put a new clinic on the property and on 28<sup>th</sup> November, 2008 executed a Financial Credit Agreement with the Industrial Development Corporation of South Africa ("IDC"). By the said facility, IDC granted LPHCL USD 21, 390, 000. 00 towards financing the project out of which only the sum of USD 4, 964, 089. 17 was advanced. The advance monies were secured by a first ranking legal mortgage over the property, executed by LPHCL in favour of IDC on 26<sup>th</sup> March, 2009.
8. The respondents, as contractors for the project, also constituted a Joint Building Contracts Committee (JBCC). This committee prepared the Principal Building Agreement (PBA) that was executed by the respondents as 'contractor', with LPHCL as the 'employer,' to facilitate the construction works on the property. In terms of the PBA, certificates for work done were to be issued monthly, and payment made within seven (7) days of the issuance, on production of a tax invoice by the respondents.
9. The PBA further provided for VH Architects of South Africa, who were approved by IDC, as the principal agent. The role of the principal agent was to certify the works done at different stages and issue interim payment certificates, referred to in paragraph

8, on the basis of which the respondents as 'contractor', would then be paid by the 'employer,' LPHCL. In the event that there was default in effecting payment, the PBA in Clause 31.16.2 provided for:

**“the exercise of a lien or right of continuing possession by the contractor, where the contractor has provided a tax invoice and the employer fails to pay or partially pays such invoice.”**  
(boldfacing and underlining supplied)

10. In line with the PBA referred to in paragraph 8, interim certificate numbers 1,2,3 and 4 that were issued between January, 2010 and December, 2010 were settled by LPHCL but there was default on payments relating to certificate numbers 5,6,7 and 8. The latter certificates were issued over the same period and amounted to a total sum of USD 2, 068, 219. 97. This amount was not disputed by LPHCL nor that it had defaulted in settling the same.
11. By reason of the default, the respondents were on 30<sup>th</sup> March, 2010 compelled to issue a notice of cancellation of the PBA. A year later, on 7<sup>th</sup> March, 2011 in apparent conformity with Clause 31.16.2 of the PBA, the respondents went on to issue an advertisement in the National Newspapers giving notice of their lien over the property and continued possession.

## **Proceedings before the High Court**

### *Litigation by the Respondents against LPHCL*

12. The respondents thereafter, proceeded to commence an action against LPHCL in the High Court of South Africa, for recovery of their professional fees relating to unpaid amounts on certificate numbers 5,6, 7 and 8. On 8<sup>th</sup> September, 2011 they obtained a default judgment in the total sum of USD 6, 509, 266. 72, inclusive of interest at 160% of the appropriate contractual rate. As it happened, the respondents failed to recover their monies for the next four years, on account of LPHCL not having any assets in the Republic of South Africa against which the judgment debt could be executed.
13. Left with no option, the respondents decided to commence fresh proceedings against LPHCL in Zambia where it had assets. On 26<sup>th</sup> November, 2015 the respondents issued originating summons in the High Court, Commercial Division, in Cause No. 2015/HPC/0520. Substantively, the cause of action was for recovery of the USD 6, 509, 266. 72 that had been awarded by the South African High Court. A judgment in default of appearance and defence, was entered in the respondents' favour on 4<sup>th</sup> May,

2016. It was registered with the Lands and Deeds Registry on 6<sup>th</sup> June, 2016.

14. About two weeks or so later, on 23<sup>rd</sup> June, 2016 the respondents applied *ex-parte* for leave to issue a writ of possession, foreclosure and for sale of the property. In his ruling dated 6<sup>th</sup> July, 2016 the High Court judge dealing with the matter, not only declined to grant the application, but also set aside the default judgment. He went further to dismiss the entire action in Cause No. 2015/HPC/0520. This was on the basis that the action had been commenced in contravention of **section 3 of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 76 of the Laws of Zambia**, and constituted an abuse of the court process.
15. Unhappy with the ruling, the respondents appealed to this Court. By judgment delivered on 15<sup>th</sup> November, 2017 in appeal No. 141/2016, we did observe that in terms of the **schedule to Cap. 76**, South Africa was not amongst the countries appearing as qualifying for reciprocal enforcement of foreign judgments. We, for that reason, affirmed this Court's decision in **Melita Pakou**<sup>4</sup> to the effect that, where a foreign judgment sought to be enforced in our jurisdiction does not have any statutory support, recourse must be had to common law. In such an event, it is incumbent on the

judgment creditor to commence a fresh action in which the foreign judgment constitutes the cause of action.

16. Premised on that position of the law, we further held that the High Court judge in the matter now subject of the present appeal, had misdirected himself when he dismissed the action whose commencement complied with common law, on an *ex-parte* application for possession, without affording the parties any hearing. The default judgment was restored for those reasons and we further granted the respondents an order for possession of the property, only.

*Litigation by IDC against LPHCL*

17. In the meantime, in apparent reaction to the default judgment that was obtained by the respondents before the High Court of South Africa on 8<sup>th</sup> September, 2011 IDC as the first ranking mortgage bond holder on 10<sup>th</sup> February, 2012 commenced a mortgage action against LPHCL in the High Court of Zambia, in Cause No. 2012/HPC/0069. The reliefs sought by IDC were therein stated as: *payment of all monies due under the mortgage agreement with interest; delivery of vacant possession of the property in issue; and, an order for sale of the property.*



18. LPHCL opposed the mortgage action, prompting IDC to trigger arbitration proceedings in South Africa sometime in October, 2012. The dispute was resolved two years later, by a settlement agreement between IDC and LPHCL dated 6<sup>th</sup> August, 2014.
19. In terms of that agreement, LPHCL was to pay IDC the sum of USD 3, 000, 000.00 and ZAR 750, 000.00 towards legal costs, in full and final settlement of the mortgage action between the two parties in Cause No. 2012/HPC/0069, upon which IDC would withdraw the action.
20. Similarly, LPHCL would in turn, withdraw an interlocutory Appeal No. SCZ/8/13/2013 that arose from those proceedings and was pending hearing before this Court. Following that withdrawal, IDC was to release the security, being the first ranking legal mortgage dated 26<sup>th</sup> March, 2009 together with the parties who guaranteed obligations under the Financial Credit Agreement. In the alternative, on the authorised written request of LPHCL and the written approval of its shareholders, IDC would cede the mortgage bond to such third party as would be proposed by LPHCL.
21. In line with the settlement agreement, the appellant paid the agreed sums to IDC upon which on 18<sup>th</sup> August, 2016 IDC promptly facilitated transfer of the first ranking legal mortgage and principal deed to the appellant. The said transfer was on the

same date, registered at the Lands and Deeds Registry. It was also registered at the Patents and Companies Registration Agency (PACRA).

*Litigation by the Appellant against LPHCL*

22. Some four years thereafter, on 13<sup>th</sup> May, 2020 pursuant to Order XXX rule 14 of the High Court Rules, the appellant issued an originating summons in a mortgage action against LPHCL in Cause No. 2020/HPC/0362. The relief sought was therein stated as: *repayment of the sums of USD 10,453,486.25 and ZAR 750,000.00 with interest, an order for foreclosure, possession and sale of the property being, Stand No. 1292, Lusaka.* In the alternative, the appellant claimed for transfer of ownership of the property in full and final satisfaction of LPHCL's indebtedness. LPHCL was subsequently, placed under receivership.
23. On 29<sup>th</sup> June, 2020, in an unexpected turn of events, the appellant and LPHCL, as parties to the action in Cause No. 2020/HPC/0362, purportedly, agreed to enter into a consent judgment. The mortgaged property was, as a result, transferred from LPHCL to the appellant, Finsbury Investments Limited, in consideration of the former's alleged indebtedness.

24. In reaction to that development, the respondents who were still in actual possession of the property on account of their professional fees that remained unpaid by LPHCL, unsuccessfully applied before the High Court, to join the mortgage action in Cause No. 2020/HPC/0362, for purposes of challenging the consent judgment.
25. By his ruling dated 15<sup>th</sup> July, 2021 the High Court Judge found that the respondents had not demonstrated sufficient interest in the property subject of the action being plot No. 1292, Chelstone, Lusaka. He also found the respondents to have contravened the law by not registering their interest in the subject property as required **by sections 4, 5, 6 and 7 of the Lands and Deed Registry Act.**

### **Proceedings before the Court of Appeal**

26. Aggrieved with the ruling of the High Court declining them the joinder sought, the respondents appealed to the Court of Appeal. In their grounds of appeal, the respondents contended that: *(i) the High Court judge erred in law and fact when he refused to join them to the proceedings, despite there being evidence of their interest in the subject matter; and, (ii) they were adversely affected by the consent judgment in issue.*

27. In its judgment dated 18<sup>th</sup> May, 2022 earlier referred to in paragraph 1, the Court of Appeal reversed the High Court ruling of 15<sup>th</sup> July, 2021 declining joinder. It determined that the respondents had demonstrated sufficient interest in the said property and were entitled to the order. The Court of Appeal decision was informed by the evidence on record that revealed the respondents had a lien over the property. It further revealed that this Court's judgment of 15<sup>th</sup> November, 2017 had not only reinstated the default judgment obtained by the respondents in Cause No. 2015/HPC/0520 for recovery of their professional fees, but also granted them a right to possession of the property.
28. Dissatisfied with the judgment of the Court of Appeal, the appellant's application for leave to appeal, as recounted earlier in paragraph 4, was declined by that Court. The application was subsequently, renewed before a single judge of this Court who granted it, premised on considerations that the appeal raises questions of general public importance, relating to the applicability of the mechanic's lien in our jurisdiction.

### **Appeal before this Court**

29. In challenging the Court of Appeal order directing joinder of the respondents to the High Court action in Cause No.

2020/HPC/0362, the appellant now seeks to ride on the applicability of the mechanic's lien in this jurisdiction.

30. In that regard, the record shows the issue of mechanic's lien was in fact introduced for the very first time by the appellant itself, in the course of its arguments before the Court of Appeal. This was in apparent reference to the effect of Clause 31.16.2 of the PBA. As earlier, in paragraph 9 reproduced, that clause provided the respondents with the right of a lien or continued possession of the property in the event of failure by LPHCL to settle any payment due to them on certified works.
31. Needless to underscore the point that the Court of Appeal addressed the issue of mechanic's lien as it had been raised in the arguments by the appellant. In so doing, at pages J21 and J22 of its judgment, the Court of Appeal noted that what is termed a construction or mechanic's lien was extensively discussed by the appellant in its arguments. The court went on to draw a distinction between the two liens in the following observation:

*“**mechanic's lien** is described as a statutory lien, that secures payment for labour or material supplied in improving, repairing or maintaining real property such as a building; whilst a **construction lien** is designed to protect professionals from the risk of not being paid for services rendered”.* (bold facing and underlining supplied)

32. The Court of Appeal considered the appellant's persistent argument that the respondents could not benefit from the mechanic's lien as there is no statutory provision in our jurisdiction for such a lien. In doing so, that court acknowledged the effect of the principle behind the mechanic's lien and the mischief it intends to cure but nonetheless, confirmed that the mechanic's lien does not apply in our jurisdiction.
33. Displeased with the said remarks, the appellant now contends that the Court of Appeal relied on the remarks in ordering joinder of the respondents to Cause No. 2020/HPC/ 0362. Accordingly, the appellant's six grounds of appeal to this Court have all been centered around the mechanic's lien and read as follows:
- “1. The Honourable Court erred in law when after admitting that there is no Statute in Zambia that creates a mechanic's lien, held that it is applicable based on the principle behind it and the mischief it intends to cure;**
  - 2. The Honourable Court erred in law when it relied on a mechanic's lien and Court order as the basis of the Respondent's interest in Stand No. 1292 Chelstone Lusaka;**
  - 3. The Honourable Court erred in law when it failed to address the public policy concerns raised by application of unilateral creation of interest in land arising from liens;**
  - 4. The Honourable Court erred when it failed to reconcile the interest of the mechanic's lien holder with the interest of the 1<sup>st</sup> ranking mortgage holder;**
  - 5. The Honourable Court erred in law and fact when it failed to reconcile the interest created by mechanic's lien with the**

**provisions of section 6 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia;**

- 6. The Honourable Court erred in law and fact when it held that the Respondents are the holders of a mechanics lien when the Respondents appealed and argued that they had an equitable lien”.**

*Appellant's Arguments in Support of the Appeal*

34. In its heads of argument filed in support of the grounds of appeal, the appellant starts with a preamble, going into considerable detail regarding the background to the matter as captured in paragraphs 6 to 24. There were two notable general contentions raised from the narrative. The first is that, although the Court of Appeal judgment appealed against to this Court relates to joinder, the said judgment created substantive rights when it recognised the respondents' lien. In the second contention, the appellant's position is that the High Court dismissed the respondents' application for joinder on the basis that they had not registered their interest with the Lands and Deeds Registry. The appellant is now seeking to assail the reversal of that ruling by the Court of Appeal and have it restored by this Court.
35. Coming to the specific grounds of appeal, the appellant in grounds one and two, argued that in the Court of Appeal it merely sought to distinguish the different types of liens and rights, but that Court latched onto the *mechanic's lien* and relied on it as the basis

for joining the respondents to the High Court action. The appellant went to great lengths in highlighting the inapplicability of the mechanic's lien despite the Court of Appeal in its judgment having already so determined.

36. In ground three of the appeal, the appellant contended that by its decision, the Court of Appeal in fact allows a party that expends money in improving another's property to acquire interest and a share in that property, without registration. It was argued that the High Court gave as the reason for dismissing the respondents' joinder application, the failure to register their interest in the property as required by **sections 4, 6 and 7 of the Lands and Deeds Registry Act Cap. 185 of the Laws of Zambia**. The submission was that, by its' reversal of the High Court ruling, the Court of Appeal allowed a legal principle that unilaterally creates interest in landed property, which raises a question of public policy.

37. The appellant's argument in ground four of the appeal, was simply that, by allowing the respondents to acquire ownership of property the Court of Appeal failed to reconcile the interest of a mechanic's lien holder, with that of a first ranking mortgage holder.

38. The issue raised in ground five of the appeal in essence, merely stretched the one subject of ground three. It underscored the



requirement to register any document that purports to create an interest in, or a charge on land and is anchored on **section 6 of the Lands and Deeds Registry Act.**

39. Lastly, in ground six, the Court of Appeal was faulted for purportedly, finding that the respondents were holders of a mechanic's lien when the respondents themselves in their appeal before the Court of Appeal, argued that their interest was an equitable lien.

*Respondents' Arguments in Opposition to the Appeal*

40. In opposing the appeal, the respondents equally gave an elaborate background of what transpired between themselves and LPHCL. Their general contentions were to the effect that, information of the IDC having transferred the mortgage bond to the appellant which is the majority shareholder in LPHCL, was suspicious. This was particularly in light of knowledge at the material time, by both Finsbury Investments Limited and LPHCL, of the respondents' interest in the property relating to their unpaid professional fees which were subject of litigation in Cause No. 2015/HPC/0520. The two entities were also said to have been alive to the effect of their said conduct resulting in disadvantaging the respondents'

interests, but still proceeded to enter into a consent judgment in Cause No. 2020/HPC/0362.

41. Premised on those facts, the respondents submitted that, this Court has been called upon to pronounce itself on a mechanic's lien, which was never in issue in the Court below. They underscored the point that, arguments around a mechanic's lien were raised by the appellant itself, brought into focus and are now being pushed to the fore.
42. According to the respondents, the issue before the Court of Appeal was simply, whether they had demonstrated sufficient interest in the subject property as to entitle them to be joined to the proceedings in Cause No. 2020/HPC/0362. The joinder sought was for the purpose of challenging the consent judgment entered into between LPHCL and the appellant, Finsbury Investments Limited as parties to that action.
43. The respondents went on to submit that the monies claimed by the appellant in the sum of USD10,500,000.00 was contributed by the same appellant as shareholders' equity into LPHCL, towards funding of the works and was kept in an escrow account, available to LPHCL. That being the case, the respondents were

entitled to demand those monies in respect of any outstanding payment for certified works, as and when payments fell due.

44. The respondents denied having barricaded themselves on the property following the advertisement referred to in paragraph 11. They argued that the interest they claim is not by virtue of an advertisement. It was rather, one grounded on a contractual lien willingly agreed between LPHCL and themselves, in Clause 31.16.2 of the PBA. This clause as already demonstrated, provides for the exercise of a lien or right of continuing possession, where there is no waiver. The case of **Teichmann Zambia Limited v Mumana Pleasure Resort and Puma Energy Zambia Plc**<sup>1</sup> was called in aid of the submission that, the respondents have an interest in the subject matter of the action.
45. In addressing the specific grounds of appeal, the respondents' brief response to grounds one, two and six, was that there is nowhere in the Court of Appeal judgment that the mechanic's lien was upheld and applied. In the event, the Court of Appeal cannot be said to have misdirected itself.
46. The respondents submitted that according to the Court of Appeal judgment, the only basis for joining the respondents to the action was the interest they were found to have in the subject matter and

the evidence on record. The respondents maintained that the principle they have espoused is that of an equitable lien, pursuant to **section 2 of the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia.**

47. Regarding grounds three and five, the respondents denied any unilateral creation of interest. They reiterated that the lien in issue is an equitable relief that was created contractually. Relying on the evidence on record, the respondents maintained it was not in dispute that they were given possession of the construction site by LPHCL on commencement of the works. A notice of lien was thereafter given by themselves through an advertisement dated 7<sup>th</sup> March, 2011. A number of authorities were cited in support of the legal proposition that, where one has expended his labour, money or skill, in the improvement of a property belonging to another, he is entitled to an equitable charge or lien over such property.
48. On ground four, the respondents contended that they were well aware of IDC as the first ranking mortgage holder. They noted, on the one hand, that the default judgment that they obtained in Cause No. 2015/HPC/0520 was registered at the Ministry of Lands earlier, on 6<sup>th</sup> June, 2016 and gave notice of their interest

in the property. On the other hand, it was pointed out that the mortgage transfer from IDC to the appellant was only effected two months thereafter, on 18<sup>th</sup> August, 2016.

49. The respondents concluded their written Heads of argument by urging this Court to uphold the Court of Appeal finding that they had indeed established an interest in the property. As such, that they were affected by the transfer and are entitled to be joined to the mortgage action in Cause No. 2020/HPC/0362.

#### **Arguments at the hearing of the Appeal**

50. When the matter came up for hearing of the appeal before us, Counsel for the appellant narrowed down the issues in contention on appeal when he clarified that, his client sought a pronouncement on the appropriateness of the joinder of the respondents to the action before the High Court and nothing more.
51. In that regard, Counsel reiterated the argument that for a party to be joined to court proceedings, the party must show sufficient interest in the subject matter of the litigation. The submission was that, the respondents had not shown sufficient interest to warrant being joined to the High Court proceedings, in Cause No. 2020/HPC/0362.

52. Counsel for the appellant went on to submit that, the respondents should not have been joined to that action as their purported lien on the property was invalid for it was neither a mechanic's lien nor constructor's lien, which could only arise by statute and no statute exists in our jurisdiction to support such liens. Non-registration of the lien was also alluded to as a factor that would invalidate it, on the basis that registration of an interest in land is a legal requirement in our jurisdiction.
53. In his oral augmentation in opposition, Counsel for the respondents contended that the starting point in an action for joinder ought to be: whether the party seeking joinder will be affected by a decision? If so, then they are entitled to be heard.
54. In this instance, it was submitted that the respondents were entitled to be heard on the basis that the property subject of proceedings in Cause No. 2015/HPC/0520, with a registered court order of 6<sup>th</sup> June, 2016 against LPHCL, had changed hands from LPHCL to the appellant. This was in an action commenced four years later, in Cause No. 2020/HPC/0362. Further, that the appellant at the time of commencing the action, was aware of the interest the respondents had in the property being an equitable interest, which by nature does not require registration.

55. It was submitted that the respondents had shown sufficient interest to be joined to the proceedings so as to set aside the consent judgment. On the issue of mechanic's lien, Counsel noted that it was one relentlessly pursued by the appellant but was never adopted by the Court of Appeal as a basis upon which joinder was ordered. The fact that the respondents would be affected by the consent judgment, Counsel further submitted, was the only consideration that informed the Court of Appeal decision to order their joinder to the action.
56. In reply, Counsel for the appellant were adamant in urging us to find that the Court of Appeal had based its decision to join the respondents on the mechanic's lien. Counsel submitted that the Court of Appeal had relied on the principle behind the lien as per its remarks, and on this Court's judgment of 15<sup>th</sup> November, 2017.
57. The submission, in the alternative, was that the respondents waived their right to a lien and continued possession. If the lien was at all found to subsist, then at best, it was merely possessory in nature by virtue of the construction works that were being undertaken.

### **Consideration and determination of the Appeal by this Court**

58. We have considered the record of appeal, the supplementary

record, the heads of arguments filed by the respective parties, authorities cited and case law to which we were referred, together with the oral augmentation made at the hearing of the appeal.

59. The thrust of this appeal, on which there is no dispute by the parties, in our view, is whether the respondents had demonstrated sufficient interest in the High Court action, in Cause No. 2020/HPC/0362 that had been settled by a consent judgment, as to entitle them to be joined to that action?
60. In considering the said question, we note that there is no contention regarding the issue of the respondents being owed sums of money for the construction works undertaken on behalf of LPHCL, on the property in issue. Further, LPHCL does not deny that it has failed or neglected to pay its debts in respect of the said works which are subject of certificate numbers 5,6,7 and 8. This is what prompted the respondents to commence an action in the High Court of South Africa, following which they obtained a default judgment in their favour. Anchored on that judgment, the respondents commenced a fresh action in Cause No. 2015/HPC/0520 in the High Court for Zambia and obtained a default judgment in the sum of USD6,509,266.72 inclusive of interest at 160% of the appropriate contractual rate.



61. The appellant has however, largely centred this appeal around the applicability of the mechanic's lien, to which it has dedicated all the six grounds of appeal. The appeal is also hinged on the alleged misapplication of the mechanic's lien, by the Court of Appeal in its decision to join the respondents to the action, which would allow them challenge the consent judgment.
62. From the outset, we wish to make it clear that we have taken note of the approach by the appellant to deploy its appeal by magnifying the issue of mechanic's lien, when the Court of Appeal categorically stated that the same is not applicable in our jurisdiction. We are disinclined to interrogate a principle that has already been found and agreed to be inapplicable in our jurisdiction, as the same would most certainly amount to a mere academic exercise.
63. Our perusal of the record has revealed that the appellant itself raised the issues of construction and mechanic's liens and extensively discussed them in its Heads of argument. It is for that reason that the Court of Appeal addressed these issues. In so doing, the appellant argued that a mechanic's lien cannot apply to the respondents, which position the Court of Appeal readily, and correctly so in our view, agreed with, as has already been demonstrated.

64. The said position notwithstanding, the Court of Appeal went on to make *obiter* remarks stating, 'it is not so much about codification, but rather, the principle behind the lien and the mischief it intends to cure'. Those remarks were not extended any further, and have clearly been taken out of context by the appellant.
65. In coming to what actually informed the Court of Appeal decision to join the respondents to the action, that Court in paragraphs 9.26 and 9.27 at pages J29 to J30, had this to say:

*"Given all this background, we do not think that the Appellants' possession of Stand No. 1292, Chelstone Lusaka was only supported by their lien, but it was backed by a Court order which was upheld by the Supreme Court on appeal. **It is therefore, our firm view that not only do the Appellants have an interest in Stand No. 1292, Chelstone Lusaka by virtue of their lien by reason of being owed by the 2<sup>nd</sup> Respondent but also by court order which granted them the right of possession.**"* (bold facing and underlining supplied).

66. The above excerpt from the judgment appealed against could not be any clearer, regarding the factors and considerations that informed the decision of the Court of Appeal. These were largely, a judgment of this Court rendered on 15<sup>th</sup> November, 2017 in which we ordered restoration of the default judgment in Cause No. 2015/HPC/0520, that had been dismissed as an abuse of the court process by the High Court in a ruling dated 16<sup>th</sup> July, 2016.

67. The said judgment, as earlier in paragraph 13 referred to, was anchored on the contractual lien that was subject of an agreement specifically, the Principal Building Agreement entered into between the respondents and LPHCL, to which the appellant was not privy.

68. Granted those facts, we are unable to discount the respondents' consistent argument in stating that the lien they are relying on was contractual, is founded on principles of equity, and termed as an *equitable lien*. According to **Halsbury's Laws of England, 3<sup>rd</sup> Edition, Vol. 24 paragraphs 285 and 286 at page 155**, an '*equitable lien*' is defined as:

“an equitable right conferred by law upon one man, to a charge upon the real or personal property of another until certain specific claims have been satisfied, and is founded on the principles of equity. It further provides that he who has obtained possession of property under a contract for payment of its value will not be allowed to keep it without payment... **An equitable lien is said to arise either from** ‘the relationship of the parties or from a course of conduct or **an express contract indicating that such an equitable charge shall be created.**” (bold facing and underlining supplied).

69. As captured above, the general rule is that a person who expends money for the benefit of another or on the property of another acquires no lien from the mere fact of having made the expenditure even though he may himself have an interest in the property. One of the exceptions to this general rule, however, is

where there is a contract, express or implied, providing for a lien to arise, as was the case in the matter subject of the present appeal, now before us.

70. In that regard, suffice to note that we are alive to the terms of the Principal Building Agreement between the respondents and LPHCL, appearing at page 104 of the Supplementary Record. As earlier stated Clause 31.16 and 31.16. 2 of that agreement specifically provides for a lien in the following terms:

“Where the contractor had provided a tax invoice and the employer has not paid or has made a partial payment only of the amount due to the contractor in terms of a payment certificate issued in terms of 31.1 **the contractor may: exercise its lien or right of continuing possession where this has not been waived** in terms of the schedule and where practical completion has not been achieved.” (bold facing and Underlining for emphasis only)

71. The facts on record could, undoubtedly, not be any clearer than what they present. This is that, the lien in issue was most certainly an equitable lien which arose contractually, by agreement of the parties. It was not a mechanic’s lien arising from a statutory provision, as suggested by the appellant in its’ arguments.

72. Having established that the lien relied upon is an equitable lien, as persistently asserted by the respondents, we have no difficulty on the facts of this case, in finding that the issue of a mechanic’s

lien did not arise at all, as to warrant determination by this Court. To delve into determination of a mechanic's lien on the facts as recounted, would amount to nothing more than an academic exercise detracting from the real issue at hand being: whether the respondents have established the requisite interest as to entitle them to be joined to the mortgage action between the appellant and LPHCL in Cause No. 2020/HPC/0362 that was settled by a consent judgment?

73. In answer to that question, we have considered the common ground facts between the parties confirming the respondents remain unpaid on certificate nos. 5,6,7 and 8 for professional services rendered. We have also considered our own related judgment of 15<sup>th</sup> November, 2017 by which we not only upheld the default judgment for professional fees obtained by the respondents in Cause No. 2015/ HPC/0520, but also granted them an order for possession of the said property.

74. Premised on those considerations, we are satisfied that the respondents have indeed established sufficient interest in the property subject of the mortgage action and find no basis to depart from the findings of the Court of Appeal that ordered the respondents' joinder to that action.

75. The order for joinder is further fortified by learned authors of **Atkin's Court Forms, Volume 28, 1992, at page 21** who state that, '*in possession cases or mortgage actions, all mortgagors and any other persons known to be asserting a claim should be made defendants.*' When the issue arose in the case of **Agape Gardens Limited & 2 Others v Coffee Board of Zambia & Another**,<sup>2</sup> this Court allowed joinder to a mortgage action, on the basis that a non-party, the 2<sup>nd</sup> respondent, would be directly affected by the outcome of the action. That decision was premised on an earlier judgment in **L. Simbeye Enterprises Limited & Another v Ibrahim Yousuf**<sup>3</sup> where, in addressing the issue of entitlement to an order for joinder, our holding was that, it is sufficient to show that a decision of the Court would affect the person applying to be joined or their interest. We find no reason to depart from the position we took in those cases.

76. Accordingly, in line with those decisions, we find that the respondents have established sufficient interest in the subject matter of the action in Cause No. 2020/HPC/0362 as to warrant their joinder to the action. This is so, by virtue of not only their equitable lien held over Stand 1292, Lusaka, that arose contractually, as provided for in Clause 31.16.2 of the Principal Building Agreement and from the evidence on record was not

waived; but also, for the fact that their default judgment against LPHCL in Cause No. 2015/HPC/0520, was restored by our judgment of 15<sup>th</sup> November, 2017 which counsel for the appellant seems to argue was subsequently set aside.

77. In passing, we also wish to mention that we are aware of the judgment of the High Court appearing at page 507 of the record that consolidated Cause Nos. 2015/HPC/0520 and 2022/HPC/0299. The latter action was commenced by the respondents, for the sole purpose of setting aside the consent judgment in Cause No. 2020/HPC/0362. This followed the Court of Appeal order for their joinder to that action. Nonetheless, as the said High Court judgment is not subject of this appeal, we are constrained to make any comment in relation thereto.

78. In conclusion, we reiterate that we are unable to fault the Court of Appeal when it found that the respondents established sufficient interest in Cause No. 2020/HPC/0362, and were properly joined to that action. For the reasons given, we find no merit in this appeal and we dismiss it.

79. Costs will follow the event and are to be taxed in default of agreement.

Appeal dismissed.



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Mumba Malila  
**CHIEF JUSTICE**



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



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J. K. Kabuka  
**SUPREME COURT JUDGE**