IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 245 of 2022**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

NASRI SAFEIDINE **APPELLANT**

AND

RABIH JABER **RESPONDENT**

CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 18th June 2024 & 25th July 2024

For the Appellant: Mr. Butler Sitali
Messrs. Butler & Co Legal Practitioners

For the Respondent: Mr. K. Mwale
Messrs. K. Mwale & Co.

JUDGMENT

Patel, JA, delivered the Judgment of the Court.

Cases referred to:

1. The Attorney General v Marcus Kampumba Achiume (1993) ZR 1
2. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)
3. Nkhata and Others v Attorney General (1966) Z.R. 124
4. William David Wise v E.F Hervey Limited (1985) ZR 179
5. Smith v Anderson (1880) 15 Ch D 247 at 273
6. Colgate Palmolive (Z) Limited v Able Shemu and Others Appeal No. 11 of 2005
7. Shirlaw v Southern Foundries Limited [1939] 2 KB 206
8. Cutter v Powell [1875] 6 Term. Rep 320
9. Maclaine v Gatty [1921] 1 AC 376, p 38
10. Zambia National Building Society v Ernest Mukwamataba Nayunda (S.C.Z. Judgment 11 of 1993) [1993] ZMSC 25 (19 August 1993)
11. Simwanza and Ors v Omel Investment Ltd and Anor (Appeal 259 of 2020) [2021] ZMCA 139 (5 November 2021)
12. Rapid Global Freight Limited v Zambia Railways Limited (CAZ Appeal 216 of 2019) [2021] ZMCA 93 (18 May 2021),
13. Minister of Home Affairs, The Attorney General v Lee Habasonda suing on behalf of the Southern Africa Centre for the Constructive Resolution of Disputes (2007) Z. R. 207
14. Zambia Telecommunications Company Limited v Aaron Mwene Mulwanda and Paul N'gandwe (2012) 1 Z.R 404

Legislation & Rules referred to:

1. The Partnership Act, 1890

Other works referred to:

1. Chitty on Contracts, Volume 1, General Principles 28th edition, Sweet & Maxwell, 1999
2. Chitty on Contracts, Volume 1, General Principles, 27th Edition, Sweet & Maxwell, 1994
3. Halsbury's Law of England, 4th edition paragraph 962.

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of **Musona E. J,** delivered on 9th August 2022, relating to a dispute arising out of a contract for services and an investment agreement between the Appellant, (Defendant in the court below) and Respondent, (Plaintiff below).

1.2 The Appeal assails findings of fact, made by the lower Court, and calls upon us to reverse the said findings. The Appellant places premium on decisions of the Supreme Court, which have settled the principle, and guided Courts in the manner, and circumstances, in which findings of fact, may be set aside by an appellate Court. Reliance has been placed on the cases of **The Attorney General v Marcus K. Achiume**[1], **Wilson Masauso Zulu v Avondale Housing Project Limited**[2] and **Nkhata & Others v The Attorney General**[3].

2.0 BACKGROUND

2.1 For the purposes of this section, the Parties shall be referred to as they appear in this Court.

2.2 On 27th July 2020, the Respondent, commenced an action against the Appellant, (*Plaintiff and Defendant respectively in the lower Court*), in the Commercial Division of the High Court, by way of Writ of Summons and Statement of Claim seeking the following reliefs:

i. Payment of the sum of $85,000.00 being money owed by the Appellant in view of the investment;
ii. Payment of the sum of $15,000.00 being money owed by the Appellant as salary arrears;
iii. Interest;
iv. Costs; and
v. Any other relief the court may deem fit.

2.3 It was pleaded in the statement of claim, that the Respondent invested the sum of $50,000.00 into the Appellant's business, in which the Respondent was employed as a worker.

2.4 It was also pleaded, that whilst employed by the Appellant, the Appellant agreed to pay the Respondent a total sum of $9,000.00 for the work done.

2.5 According to the Respondent, he further gave the Appellant the sum of $15,000.00 as direct capital for the Appellant's business.

2.6 By an e-mail dated 22nd September 2018, the Appellant, promised to pay the Respondent $15,000.00 as salary arrears and $85,000.00 for his investment. However, the Appellant did not follow his commitments, which caused the Respondent to file an action claiming that he had incurred loss and damage.

DEFENCE AND COUNTER-CLAIM

2.7 The Appellant filed his defence and counterclaim, on 10th August 2020, and pleaded that the Respondent was not entitled to any of the reliefs sought in his Statement of Claim. The Appellant denied the allegations that the Respondent invested $50,000.00 in his company and countered instead, that the said amount, was the Respondent's contribution to a partnership made between the Respondent and a company called Star Drilling and Exploration Limited (SDEL) in which the Appellant was a managing director and shareholder.

2.8 The Appellant pleaded in his defence, that both parties agreed to carry on together using a Schramm Drilling Rig, (*hereinafter referred to as The Rig*), which the two agreed to buy, and operate, as a partnership business.

2.9 The Appellant denied the allegation that he employed the Respondent, at a monthly salary of $9,000.00. It was the Appellant's defence that he had organized another job for the Respondent, at the joint venture company, between SDEL and the National Technologies Limited, where the Respondent was to receive a monthly salary of USD 1,500.00 and where he

worked for six months only, due to the termination of the joint venture between SDEL and National Technologies Limited.

2.10 The allegation that the Respondent invested a further $15,000.00 into the Appellant's company was denied. It was pleaded at **paragraph 5** of the defence and counterclaim, that the $15,000.00 was allegedly spent by the Respondent on clearing the Rig, which had been imported by both the Respondent and SDEL and recovering it, after it was involved in a road traffic accident, on its way to Lusaka from Dar Es Salaam.

2.11 The Appellant in his e-mail, of 22nd September 2018, which he wrote as Managing Director of SDEL, stated that the payment of the sum of USD 85,000.00 to the Respondent, would be paid from the proceeds, of the sale of the Rig, which Rig was held on to by the Respondent, despite the two partners having agreed to sell it.

2.12 It was pleaded, that following the mismanagement of the drilling business, by the Respondent, it was agreed by both the Respondent and SDEL, that the partnership between SDEL and the Respondent, be wound up and that the Rig, which had been bought for the partnership business, be sold and the proceeds be shared between the Respondent and SDEL.

2.13 The particulars of the counterclaim are noted on record. The Appellant presented the following claims:

i. An order that the drilling business partnership between the Appellant Company, Star Drilling and Exploration Company Limited (SDEL) and

the Respondent wherefore the Schramm drilling rig was purchased be dissolved.

ii. *An order that the Schramm drilling rig be sold, and the proceeds be shared between SDEL and the Plaintiff in accordance with their respective contributions to the partnership.*

iii. *Payment to SDEL from the proceeds of the sale of the Schramm drilling rig of the following expenses which were incurred by the SDEL, namely;*

a) *Money spent by SDEL on repairing the damage to the drilling rig after it got damaged in a road traffic accident en route to Lusaka from Dar Es Salaam.*

b) *USD 53,000.00 being money spent by SDEL on modifying the Schramm drilling rig including the installation of a bigger compressor, upgrading of the pumps and motors.*

c) *USD 35, 000.00 being money spent by SDEL by availing the Mercedes Benz Unimog, heavy duty toll box and Nissan 4 x 4 vehicle.*

d) *USD 15,000.00 being money spent by the SDEL on koken drill rods.*

e) *Money spent by SDEL on UPVC casings, 15 hand pumps and other equipment and accessories which were to be utilized for the drilling jobs in Kalomo and Livingstone.*

iv. *An order that the Plaintiff render an account on how the resources availed by the SDEL for the Kalomo and Livingstone drilling jobs were utilized.*

2.14 Subsequently, on 1st September 2020, the Respondent filed his Reply to defence, and defence to counter claim and averred that the Respondent did not enter into a partnership agreement with the Appellant.

3.0 DECISION OF THE LOWER COURT

3.1 In summary, the main issues in the lower Court, centered on the following questions:

i. *Whether the Respondent established a clear cause of action against the Appellant?*

ii. *Whether the Appellant is the proper party to be sued in the matter?*

3.2 The learned Judge, referred to the case of **William David Wise v E.F Hervey Limited** [4] in which the Supreme Court held as follows:

> *"A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."*

3.3 The learned Judge in agreeing with the above principle, found that the Respondent's pleadings, disclosed a cause of action, against the Appellant which established his right to the remedies sought.

3.4 The learned Judge found that the cause of action, was premised on an oral agreement, to conduct a drilling business, after the purchase of a Schramm Drilling Rig. That, although the Respondent claims that this agreement was made between himself and the Appellant, the Appellant, claims that he entered a partnership, on behalf of SDEL in his capacity as managing director. The learned Judge noted the Appellant's claim that the agreement/partnership was made between the Respondent and SDEL.

3.5 The learned Judge was of the view that a partnership is the relationship which exists between persons carrying on a business in common, with a view to profit and stated that this is consistent with **Section 1 of the Partnership Act[1].** The learned Judge noted that it involves an agreement between two or more parties, to enter a legally binding relationship and is essentially contractual in nature.

3.6 The learned Judge considered the case of **Smith v Anderson** [5] and relied on the guidance of James L.J., who defined the concept of partnership in the following terms:

> *"An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or*

during a limited time, and is essentially composed of the persons originally entering into the contract with one another."

3.7 In light of the above, the learned Judge took the view, that there should be a contract at the root of the partnership, and partners must be definite individuals. He referred to the case of **Colgate Palmolive (Z) Limited v Able Shemu and Others,**[6] in which it was stated that a party is bound by an agreement, in the absence of fraud, mistake or misrepresentation which he freely and voluntarily executes.

3.8 The learned Judge found that it was not disputed, that there existed an oral agreement to carry on drilling business; what was unclear, was the parties to the oral agreement.

3.9 It was his considered view, that as there was no written instrument to ascertain parties to the agreement, as well as the obligations of each party, extrinsic evidence in this case was necessary to establish the same.

3.10 The learned Judge was of the view, that where an agreement between parties is partly oral and partly written, extrinsic evidence is admissible to prove the oral part of the contract, and this may be implied from the conduct of the parties. The learned judge noted that the e-mail of 22nd September 2018, was extrinsic evidence, which can be admitted, ascertaining the terms of the agreement. He noted that the said e-mail, is entitled "***Agreed Settlement of Partnership Schramm***" (emphasis ours) and is from the Appellant to the Respondent.

3.11 The learned Judge referred to the six terms contained in the e-mail which he viewed to be of material importance.

3.12 The learned Judge noted that the test, which is often used by the Courts, in implying a term into a contract is the *'officious bystander'* test, whose origin lies from the statement of Lord Mackinnon L.J in **Shirlaw v Southern Foundries Limited**[7] at page 26 which reads as follows:

> *"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, 'Oh, of course'".*

3.13 The learned Judge was of the view, that the test, applied in the current case, and found that it was reasonable, and equitable, to conclude that the agreement was made between the Respondent and the Appellant; otherwise, "SDEL" would have been used in place of "NASRI". He noted at page **J32,** line 5, that the e-mail ascribed the obligations to "pay or refund," to the Respondent, in his personal capacity, and makes no mention that he was merely acting for SDEL.

3.14 On that basis, the learned Judge found that the Appellant, and not SDEL, was the party to the agreement/partnership and is a proper party to this suit.

3.15 As it relates to the other terms of the agreement, contained in the e-mail, the learned Judge at **page J33**, formed the view that it was not an agreed term that *"each party would recover their contribution to the partnership from the proceeds of the sale of the rig"* as the Appellant alleged. The learned Judge noted that it was clear from the evidence, that the Appellant did not perform his obligation to pay the Respondent; thereby causing the Respondent to hold on to the Rig as a lien. He referred to the decision of **Cutter v Powell**[8] where the court stated as follows:

> *"Parties must perform precisely all the terms of the contract in order to discharge their obligations...A breach of contract occurs if a party to a contract fails to comply with his obligations under it or performs his obligations in a defective manner... In other words, the law will not regard a person to have discharged the contract unless he has completely and precisely performed the exact thing that he agreed to do under the contract."*

3.16 The learned Judge, also referred to the Learned Authors of **Chitty on Contracts,**[1] who state the general rule, relating to the performance of a binding contract at **paragraph 22-001** as follows:

> *"The general rule is that a party to a contract must perform exactly what he undertook to do."*

3.17 The learned Judge noted, that the basic principle of the doctrine of estoppel, is that a person who makes, by words or conduct, a representation to another, intending that other to act on it, and the other

does so to his detriment, he will not be allowed subsequently to take a position inconsistent with the representation and referred to the case of **Maclaine v Gatty**[9]**.** He took the view that the Appellant is therefore estopped from going back on his promise.

3.18 The learned Judge, in addressing the claim for damages, noted that breach of contract, gives rise to a secondary obligation, to pay damages to the innocent party who has suffered because of the breach. He referred to the guidance of the Supreme Court in **Zambia National Building Society v Ernest Mukwamataba Nayunda**[10]**,** in which the court stated as follows:

> *"... The essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched."*

3.19 The learned Judge, was of the view, that the Appellant did not honor the agreement to the Respondent. He found that the Appellant breached the agreement, when he reneged on his promise to pay the Respondent. He found that the Respondent had a valid claim to damages and awarded the same to the Respondent to be assessed by the Learned Deputy Registrar, similarly with the claim for interest.

3.20 In relation to the claim for salary arrears, the learned Judge considered the evidence at trial, in which the Respondent admitted that he did not have evidence to show that he had worked for eighteen (18) months and did not grant this claim.

3.21 Ultimately, the learned Judge, upheld the terms of the agreement, in accordance with the e-mail of 22nd September 2018, and ordered the Appellant to settle its indebtedness to the Respondent, immediately. The learned Judge further ordered, that after the Appellant had settled his indebtedness to the Respondent, the Rig be sold, and the proceeds used to offset the Respondent's expenses as agreed by the parties.

4.0 THE APPEAL

4.1 Dissatisfied with the outcome in the Court below, the Appellant filed a Notice and Memorandum of Appeal on 2nd September 2022, fronting six (6) grounds of appeal, namely:

i. *The learned judge in the court below erred in law and fact when he held that the e-mail of 22nd September 2018 constituted a contract which the Appellant was supposed to perform, when in actual fact the e-mail of 22nd September 2018 was merely a record of the issues that the parties had agreed towards dissolving their partnership.*

ii. *The learned trial judge erred in law and fact when he held that according to the e-mail of 22nd September 2018, the Appellant was supposed to pay the Respondent and then recover what he spent from the sale of the drilling rig and not vice versa, yet the evidence of the parties in court showed that what the parties had agreed was that the payments listed in the e-mail of 22nd September 2018 were to be paid from the proceeds of the sale of the drilling rig. In other words, the*

learned judge in the court below re-wrote what the parties had agreed in the e-mail of 22nd September 2018.

iii. *The learned judge in the court below erred in law and fact when he ignored all the evidence pointing to the fact that the relationship that the Respondent had entered into either with the Appellant or with Star Drilling and Exploration Company Limited was a partnership, and that the e-mail of 22nd September 2018 was therefore supposed to be interpreted in the context of a partnership relationship.*

iv. *The learned judge in the court below erred in law and fact when he failed to appreciate that in a partnership, the partners are only entitled to share the assets upon dissolution of the partnership.*

v. *The learned judge in the court below erred in law and fact when he held that the Respondent was holding onto the Rig as a lien when no such evidence was presented in court, and against all evidence which showed that the Respondent and the Appellant had agreed to sell the drilling rig in order to dissolve their partnership.*

vi. *The learned trial judge misdirected himself in law and fact when he did not pronounce himself on the Appellant's other counter- claims including that the partnership be dissolved.*

5.0 APPELLANT'S HEADS OF ARGUMENT IN SUPPORT OF APPEAL

5.1 We have duly considered and appreciated the Appellant's Heads of Argument filed on 25th October 2022.

5.2 The gist of grounds 1, 2 and 3, hinge on the submission that, there was an existing partnership between the parties, and that the e-mail dated 22nd September 2018, was a record of the terms upon which the parties had to agree to settle or dissolve their partnership.

5.3 The Appellant at **paragraph 1.20** of his Heads of Argument, urges this Court, to reverse the finding of the lower Court that the e-mail was a contract to be performed by the Appellant. It is the submission, that should the Court be of the view, that the e-mail constituted a contract, then it is their response, that the payments promised to be made under the contract were dependent upon the Respondent selling the Rig. **Page 212, Line 20-25** of the Record of Appeal (ROA). It is his argument that the Respondent having refused to sell the Rig, which is still in his possession, he is estopped from demanding payment from the Appellant, as he has not delivered on his executory consideration.

5.4 The Appellant referred the court to the learned authors of **Chitty on Contracts, General Principles** [2] which states as follows:

> *"The general rule is where one party failed to perform a promise which went to the whole of the consideration, the other was released from performance as the former had not performed that which a condition precedent to the latter's liability."*

5.5 It is the argument that since the payment of amounts specified in the e-mail, was conditional, upon the Rig being sold, the Appellant, cannot be expected to pay the said amounts before the Rig is sold.

5.6 It is his submission, that even under cross-examination, the Appellant was categorical, that the amounts stated in points 1-6 of the e-mail were to be paid after the sale of the Rig.

5.7 As it relates to ground 4, it is the Appellant's submission, that the learned Judge erred in law and fact, when he failed to appreciate that in a partnership, the partners are only entitled to share the assets upon dissolution of the partnership. It is the submission that owing to differences, the parties ceased to carry out the drilling business, for which the partnership had been established, which, it is canvassed, meant that the partnership had technically ceased to exist.

5.8 It was further submitted that the background against this argument is that the parties held a meeting, which meeting, the Respondent acknowledged took place, and which addressed the issue of the sale of the Rig. It is the submission that following that meeting, the Appellant sent the e-mail of 22nd September 2018, to the Respondent, which was a record of what the parties had agreed in dissolving the partnership evidenced by the title of the said e-mail which reads:

"Subject: RE ***Agreed settlement of Partnership*** *Schramm (Six Points."*

5.9 It is the submission that had the learned Judge, in the Court below, borne in mind what happens to the assets of a partnership upon dissolution of partnership, he would not have arrived at the conclusion he did. It is the argument that the learned Judge ought to have arrived at the finding that the Rig, which was the partnership asset, would have to be sold before any payments to creditors and the partners could be made.

5.10 In relation to ground 5, the Appellant's contention is that there was no evidence to suggest that the Respondent was holding onto the Rig as a lien.

5.11 Lastly, in relation to ground 6, the Appellant argued that the learned Judge misdirected himself when he did not pronounce himself on the Appellant's counterclaim, including that the partnership be dissolved.

5.12 It is the argument that a counterclaim is an action and deserves to be addressed and adjudicated upon by the Court. The Appellant placed reliance on the decision of **Zulu v Avondale Housing Project Limited** [2] in which the Supreme Court stated as follows:

> *"The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality."*

It was submitted that the issues raised by the Appellant in his counterclaim, were not adjudicated upon, despite the Respondent having substantially admitted most, if not all of them.

6.0 RESPONDENT'S HEADS OF ARGUMENT

6.1 We have equally considered and appreciated the Respondent's Heads of Argument filed on 28th November 2022.

6.2 As it relates to grounds one, two and three, the Respondent's argument is that the e-mail dated 22nd September 2018, was not evidence of an agreement between the Appellant and the Respondent, or a contract, as held by the High Court. It is the submission that the e-mail dated 22nd September 2018, was a record of debt owed by the Appellant to the Respondent, and a record of the terms which the parties had agreed to settle or dissolve the partnership relating to the Rig.

6.3 It is the submission that the subject of the e-mail was only a proposal or offer to resolve the issues raised in the contents of the e-mail, and not a partnership settlement agreement as alleged. It is further the argument that the e-mail only served as confirmation of the Appellant's personal obligation to pay the Respondent's debt.

6.4 It was the Respondent's submission that the e-mail dated 22nd September 2018, arose from a meeting between the parties, and in which the Respondent was seeking payment of monies owed to him by the Appellant. It was argued that after the said meeting, the Appellant wrote the e-mail in which he acknowledged certain debts owed to the Respondent and proposed to pay the debts which were acknowledged as being owed to the Respondent.

6.5 It was further submitted that there was no evidence on record, either documentary, or otherwise, that pointed to the existence of a partnership between the Appellant and Respondent which needed to be dissolved.

6.6 In relation to ground 4, the Respondent submitted that the allegation that all payments to creditors like ZRA, PACRA and the accountant were proof of the winding up of the partnership is false. It is the submission that the debts owed to ZRA, PACRA and the accountant were debts of SDEL, which was the company in which the Respondent was a director and employee.

6.7 In relation to ground 5, it is the Respondent's submission that he was not deployed to Southern Province to work for the Appellant, but rather as an employee of SDEL. It was the submission that the e-mail of 22nd September 2018, was merely an offer, and not an agreement, which contained proposals of how the debt would be settled by the Appellant. It is the argument that the Respondent refused to accept the terms of the offer on how the debt would be settled, hence the matter that was commenced in the High Court.

6.8 It was the argument that there was no evidence on record, which evidences an agreement to sell the Rig, and that there is no acceptance of the offer by the Respondent, which acceptance would result in an agreement.

6.9 In relation to ground 6, the Respondent's submission was that the lower Court did address its mind to the counterclaims of the Appellant as it considered the Respondent's claims and prayed that this Court dismiss the appeal for lack of merit.

7.0 THE HEARING

7.1 At the hearing of the appeal, Counsel placed reliance on their respective heads of argument, and Counsel Sitali reiterated the Appellant's submission, that the e-mail of 22nd September 2018, was in fact an agreement to be realized after the sale of the Rig.

8.0 DECISION OF THE COURT

8.1 We have had occasion to review the judgment of the lower Court, alongside the heads of argument and submissions of the parties.

8.2 In dealing with the appeal, we shall address grounds 1, 2 and 3 of the appeal together, as they are interrelated, and all speak to the e-mail of 22nd September 2018. We have carefully examined the Record, and hold the view that the starting point, is the e-mail dated 22nd September 2018, which reads as follows:

> *"**Subject: Agreed settlement of partnership Schramm***
> *(Six points)*
>
> 1. *Nasri agrees that Rabih takes back his capital = $50,000.*
> 2. *Rabih worked in the J.V, NISIR for six months and not 18 months @ $1,500 = $9,000.*
> 3. *Nasri agrees to refund a probable "recorded" debt = $15,000.*

4. *Small Concrete Block Factory was utter loss due to lack of management, product quality, bankruptcy, and was closed down by NASRI to stop sunken funds; therefore, agreed NO CLAIM.*

5. *Land/House, that Rabih had been verbally promised by his ex-boss/partner! Thereafter wanted to create a sort of miss-conduct during their stay in my house (Traditionally inapt). Therefore I had interfere to cool the situation by somehow verbally saying that I'll try to make amicable amends (bearing in mind that his boss then Mr. M Ibrahim, had asked him to retrieve the same value from an Insurance/case costs from Freight forwarding company), and therefore, the value of the same at the time would have been between $10,000 & $15,000 never to be expected.*

6. *Agreed: - the balance of funds in the Star Drilling bank account at Standard Chartered bank (of which Rabih has already drawn K30,000=$3000 for his personal use). Nasri shall pay out all company related encumbrances due to ZRA, public company statutory compliance, accountant Mr. Sakala, sending the Rig's engine with a mechanic to Livingston...etc. Nasri agrees to give the balance of remaining funds to enable Rabih complete the assembly and Rig preparation for sale. The sales amount would be used to offset the above agreed points, from 1, to this number 6."*

8.3 It is the Appellant's submission that the e-mail of 22nd September 2018, is a record of the terms upon which the parties had agreed to settle, or dissolve, their partnership, relating to the Schramm drilling business.

8.4 It was the Appellant's submission, that under cross-examination, the Appellant was categorical, that the amounts stated in points 1-6 of the e-mail were, to be paid after the sale of the Rig, evidenced in the proceedings as follows:

> *"Q: Witness when you were referred to point number 3 also, you did mention that all that is payments or refunds which were being referred to were subject to something, what something is it that you were referring to that it was subject to?*
> *A: Sale of Schramm (drilling rig), that is the bone of contention."*

8.5 It is clear, from the record, that the bone of contention, as identified at trial, revolved over the sale of the Rig.

8.6 We have equally considered the Respondent's argument, in which it is submitted, that there is no evidence on record, documentary, or otherwise, that points to the existence of a partnership between the parties which needed to be dissolved. It is the argument that the above-mentioned e-mail is not evidence, of an agreement between the parties, but is a record of debts owed by the Appellant to the Respondent.

8.7 Having considered the above, we have perused the record and note, that both parties do not dispute that the e-mail arose from a meeting that took place between the parties. It was, after this meeting, that the Appellant

proceeded to write the e-mail to the Respondent, regarding the sale of the Rig, evidenced at **page 166,** lines 1 to 7 of the RoA.

8.8 We are alive to the fact that a partnership, is the relation which subsists between persons carrying on a business in common, with a view of profit. In **Simwanza and Ors v Omel Investment Ltd and Another,**[11] the Court stated that in a partnership, partners are jointly responsible for the activities of the partnership.

8.9 It is manifestly clear from the Record before us, that there is no written evidence, that establishes the existence of a partnership between the parties. We have noted the case of **Smith v Anderson,**[5] referred to by the learned Judge, in his judgment at **page J29** which states as follows:

> *"An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time and is essentially composed of the persons originally entering into the contract with one another."*

8.10 In view of the above, we refer to the learned Judge's decision at **page J30** in which he stated:

> *"Where an agreement between parties is partly oral and partly written, extrinsic evidence is admissible to prove the oral part of the contract, and this can be implied from the conduct of the parties. The e-mail of 22 September 2018 is extrinsic evidence which can be admitted to ascertain the terms of the agreement."*

8.11 Whilst we accept, that there is no evidence on record, to conclude that the parties entered a partnership, we are of the considered view, that there was a contract, or a working relationship, between the parties, as shown by the e-mail of 22nd September 2018. We are alive to the principle of performance of a contract, which was discussed in the cited case of **Cutter v Powell**[8].

8.12 In view of the above, the obligation to pay the Respondent, as per the e-mail in issue, was not hinged on, or dependent on the existence of a partnership. In our considered opinion, it hinged on the only evidence that was placed before the lower Court, being the agreement between the parties.

8.13 It is easily discernible that the listed terms, from point 1 to 6, are conditional on the sale of the Rig. This can be seen from point 6 of the e-mail below which states as follows:

> *"Nasri agrees to give the balance of remaining funds to enable Rabih complete the assembly and Rig preparation for sale. The sales amount would be used to offset the above agreed points, from 1, to this number 6."* *(Emphasis ours)*

8.14 We refer to the learned authors of **Chitty on Contracts, General Principles** [2] which states as follows:

> *"The general rule is where one party failed to perform a promise which went on to the whole of the consideration, the other was*

released from performance as the former had not performed that which a condition precedent to the latter's liability."

8.15 We agree with the submissions on record, that payments promised to be made under that contract, were dependent upon the Respondent selling the drilling rig, and as the Rig is still in his possession, the Appellant, cannot be expected to pay the said amounts before the Rig was sold.

8.16 In our decision, in the case of **Rapid Global Freight Limited v Zambia Railways Limited**[12] at paragraph 10.5, We noted as follows:

"In contract, a condition precedent details an event which must take place before a contract or a party's obligations under a contract. According to ***Halsbury's Law of England, 4th edition paragraph 962***[3]*, a condition precedent is defined as follows;*

"A contractual promise by one party may be either unconditional or conditional. A conditional promise is one where liability to perform depends upon something or event, that is to say, it is one of the terms of the contract that the liability of the party shall only arise, or shall cease, on the happening of same future event which may or may not happen."

(emphasis is by the Court).

8.17 It is apparent that in this appeal, we are dealing with a condition precedent to the performance of the contract, between the parties. What we take from the reasoning of the case above, is that, with a condition precedent to performance, there is a contract, but that the obligations, of one, or both of

the parties are suspended. Liability to perform only arises on the performance of the condition. Based on the evidence on record, we are of the considered view that the e-mail, central to the issue, constituted a valid contract between the parties, that included a condition precedent to the performance of the agreement.

8.18 Save for our finding on the issue of Partnership, we find merit in grounds 1, 2 & 3 only, to the extent that the agreement or contract between the Parties, was confined to the e-mail that we have referred to.

8.19 With reference to ground 4 of the appeal, the Appellant has submitted that upon cessation of the business, for which it was established, the partnership came to an end. The Appellant has canvassed the argument, that the learned Judge erred, when he failed to appreciate that partners are only entitled to share the assets upon dissolution of the partnership.

8.20 It was the Appellant's submission that the parties were waiting to dispose of the partnership asset, which was the Rig, and to pay creditors such as ZRA, PACRA and the accountant. It was against this background that the parties held a meeting, which the Respondent acknowledged took place, regarding the sale of the Rig. It is the submission that this was made clear by the title of the e-mail, which speaks to the settlement of the partnership.

8.21 The Respondent's contention is that the Appellant's submission, that all payments to creditors such as ZRA, PACRA and the accountant was proof of winding up is false. It is his submission that the debts owed to ZRA, PACRA

and the accountant were debts of SDEL. It was also his submission that the lower Court was on firm ground in rejecting the contention of a partnership, as no proof was provided of the existence of the alleged partnership. Therefore, the considerations of dissolution of a partnership were not needed to be considered by the Court.

8.22 We are of the considered view, that although there is finding of a strained relationship, and which may support the Appellant's submission, of the breakdown in the existing business relationship, that, does not constitute evidence of a Partnership between the Parties. A detailed review of the remaining portions of the e-mail, namely, *lines 10 through 20*, on **page 86 & 87** of the RoA, under the subheading "*Settlement of Finances,*" shows and demonstrates how the parties had agreed to go their separate ways.

8.23 It is abundantly clear, that, there being no proof of partnership, ground 4 must be dismissed.

8.24 We note with respect to ground 5, the Appellant has submitted, that the lower Court erred in law and fact when he held that the Respondent was holding onto the Rig, as a lien, when no such evidence was presented in Court. We have painstakingly pondered over the arguments of the parties, and have scrutinized the RoA, and find that the Respondent did not state that he was holding onto the Rig as a lien.

8.25 We are alive to findings of fact made by a trial Court and the limited circumstances in which those can be set aside. The noted case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[2] refers. In that decision, the Supreme Court guided as follows:

> *"Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."*

8.26 The judgment of the lower Court at *page J33* **page 38** of the RoA, provides:

> *''It is clear from the evidence that the Defendant did not perform his obligation to pay the plaintiff; thereby causing the plaintiff to hold on to the rig is some sort of lien.''*

As the Respondent did not bring up the issue of lien on the Rig, we believe the learned Judge, erred in arriving at this finding, which we set aside for being perverse, and made in the absence of any relevant evidence. We find merit in ground 5.

8.27 Consequent upon this finding, we must comment on the finding of breach of contract, and subsequent award of damages, made by the lower Court, in favor of the Respondent. We hold the view, that the Respondent had failed to discharge the burden of proof required and had not adduced sufficient evidence to substantiate his claim, that he had suffered loss and

damage. It was clear from the conduct of the parties, that there was an agreement in existence. The Respondent still has the Rig in his possession.

8.28 We refer to **page J36** of the judgment which reads as follows:

> *"From the facts of this case, it is clear that the Defendant did not honor the agreement to the Plaintiff. Although the Defendant attempted to justify his non-performance, I find that he did in fact breach the agreement when he reneged on his promise to pay the Plaintiff. I therefore find that the Plaintiff has a valid claim to damages. I accordingly award damages to the Plaintiff as he has a valid claim to damages. I accordingly award damages to the Plaintiff to be assessed by the Learned Deputy Registrar..."*

8.29 We disagree with and set aside the award of damages made by the learned Judge as there was no legal basis upon which the lower Court awarded damages to the Respondent.

8.30 With reference to ground 6, it is argued that the learned Judge erred in law and fact, by not pronouncing himself on the counterclaim of the Appellant.

8.31 In support of the principle, that a judgment must not be interpreted; it should be thorough, exhaustive and clear on all issues, reference was made to the cases of **Minster of Home Affairs, The Attorney General v Lee Habasonda suing on behalf of the Southern Africa Centre for the Constructive Resolution of Disputes**[13], and **Zambia Telecommunications Company Limited v Aaron Mwene Mulwanda and Paul N'gandwe.**[14]

8.32 We have scrutinized the Judgment of the lower Court, and are persuaded by the foregoing authorities, to hold that in *casu,* the learned Judge, in failing to pronounce himself on the counterclaim, did not fully execute and conclude his function.

8.33 However, and as we have noted already, from the record available before us, there was little, or no evidence placed before the lower Court, to support the existence of a Partnership. Consequently, it remains without doubt, that there was nothing to be dissolved

8.34 We have also considered the transcript of proceedings in the lower Court from **pages 205 to 211** of the RoA and have noted the cross examination of the Appellant, on his counterclaim. The Appellant placed no evidence before the lower Court, for it to find in his favor on any of the counterclaims, even if it were to have pronounced on the same. It follows that if there is no finding of a partnership, all other claims in the counterclaim must suffer the same fate.

The only misdirection, being that the lower Court, did not specifically pronounce on the fate of the counterclaims. For the avoidance of doubt, the counterclaims of the Appellant are dismissed.

8.35 The effect of our finding, is that we uphold the learned Judge's order, only to the extent of the sale of the Rig, after which the Appellant shall pay the Respondent in accordance with the e-mail dated 22nd September 2018. We make no award of interest.

8.36 In the circumstances of the case before us, we order that costs both in this Court, and in the lower Court, be borne by the parties respectively.

M. J. SIAVWAPA
JUDGE PRESIDENT

F.M CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL S.C.
COURT OF APPEAL JUDGE